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The Ethical Significance of the
Rise of Justice in Primitive Society

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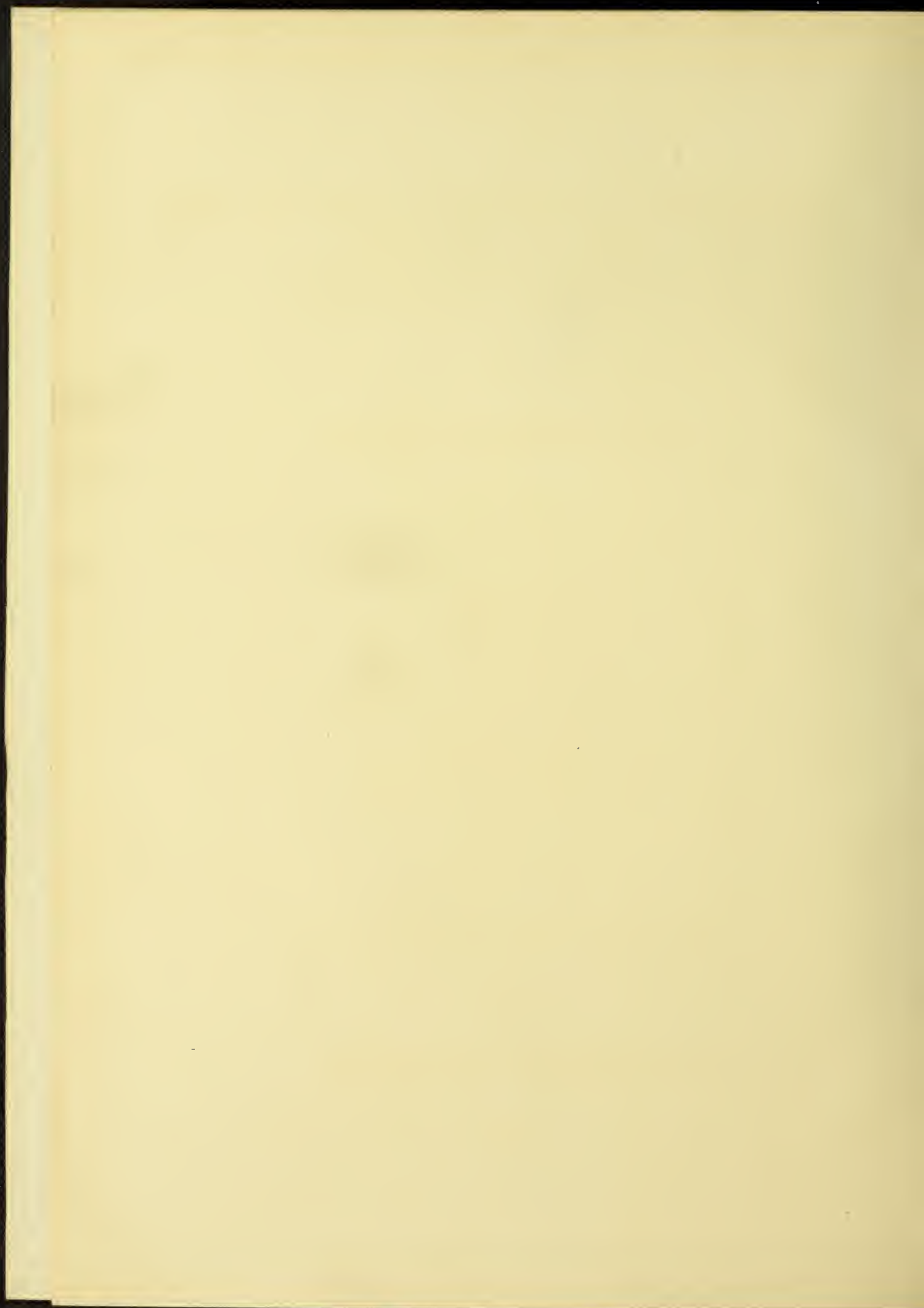
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THE ETHICAL SIGNIFICANCE OF THE
RISE OF JUSTICE
IN PRIMITIVE SOCIETY

BY

PAUL EVERETT BELTING

THESIS

FOR THE

DEGREE OF
BACHELOR OF ARTS

COLLEGE OF LITERATURE AND ARTS

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THIS IS TO CERTIFY THAT THE THESIS PREPARED UNDER MY SUPERVISION BY

Paul Everett Pelting

ENTITLED

The Ethical Significance of the Rise
of Justice in Primitive Society

IS APPROVED BY ME AS FULFILLING THIS PART OF THE REQUIREMENTS FOR THE

DEGREE OF

Bachelor of Arts

Arthur H. Daniels

Instructor in Charge

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A. H. Daniels

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Dear Sir

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Yours faithfully

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Chapter 1.

REVENGE IN ITS FIRST STAGE.

In the study of the rise of justice one finds a proper analogy between it and the argument of three little Chinese princes about the origin of rice. The first prince said it had its origin in the golden bowl, having seen it always served from that vessel. The second prince said it came from the great iron kettle, because he had seen the chef prepare the food. The third prince said it came from the rice cleaners, having seen the servants husk and fan the grain. Thereupon the tutor joined in to tell the little boys that it was necessary to prepare the ground, sow the seed and reap the harvest before the rice could be threshed, cooked in the great iron kettle, and served from the golden vessel. In the same way justice was not ready made for the primitive men and dispensed to them by an elaborate court system, but was a long process of tilling the ground and sowing the seed ere the harvest was reaped. The distinction between intentional and unintentional acts, the placing of individual responsibility and the establishment of a well developed judicial organization is the result of long ages of growth.

Primitive society has scarcely any language in the modern sense of the term. Certainly they have no books of recorded tra-

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ditions and thought. Consequently we can expect to find no systems of ethics and philosophy among them. Where then shall we direct

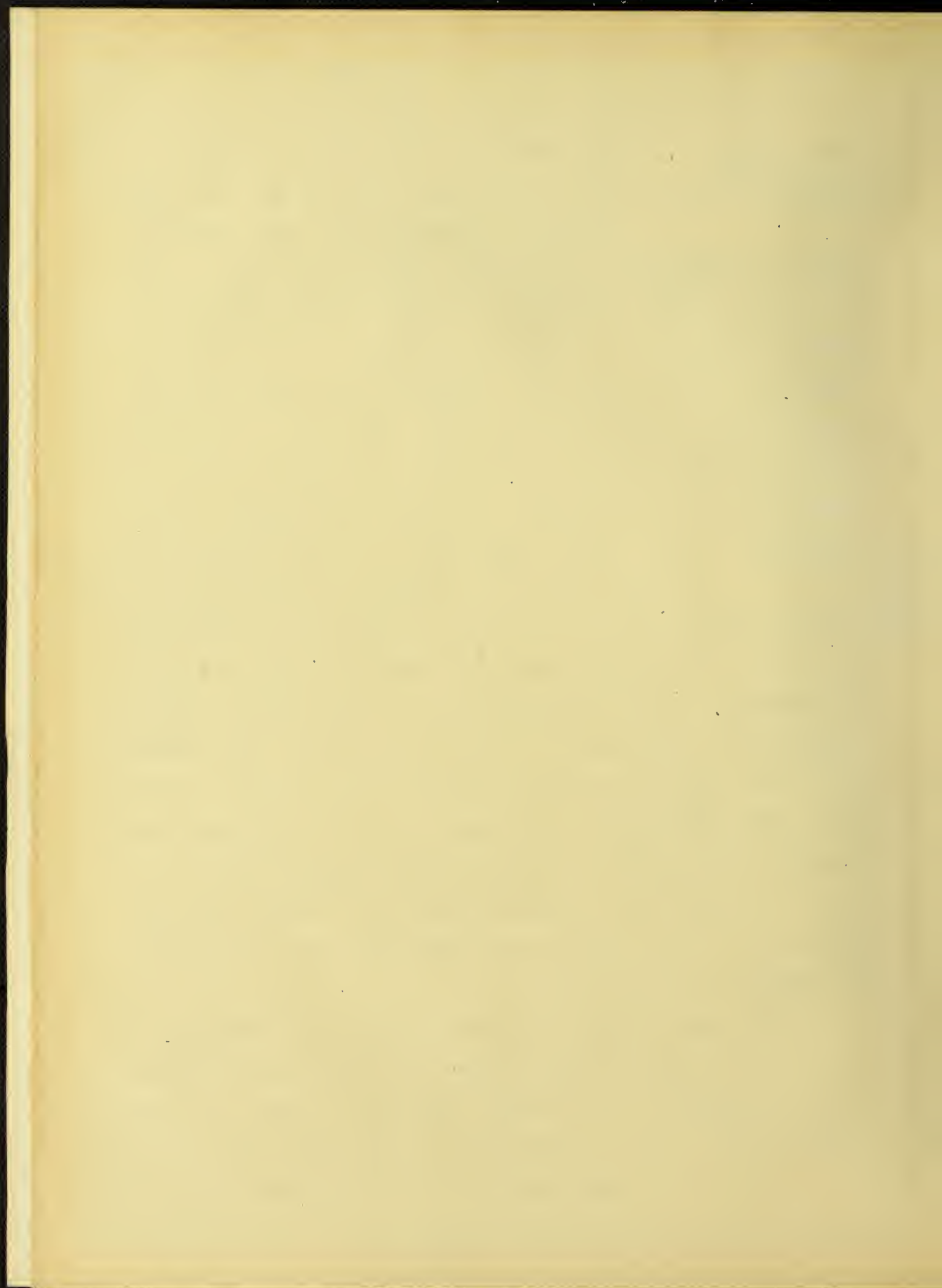
Moral values of primitive man found in his customs. our attention in the study of justice and its moral significance? We must turn the pages of

ethnology and anthropology with thought focused on customs, religion, myths, and vengeance, to bring to light the salient features of morality involved in the conception of justice. Vengeance is the law of punishment in all uncivilized societies. Private wrongs were revenged by the individual and any one whom he could get to help him. There were no precedents for determining how many or who should interfere or aid in carrying out an act of vengeance. Sometimes the vengeance executed Vengeance. was a violent explosion of a little group-comparable

to lynch law- on an offender. No restraining emotion held the mob in check and the forms of punishment received were as varied as the mob was ingenious. Sometimes there was a sort of concerted action by the government at large against offenses involving the public welfare. Those acts calling forth communal action were treason, witchcraft, and violation of taboos. A violation of the marriage vow which might result in unchastity was, if reckoned with, a private wrong, privately avenged, whereas the marriage contracted with a non-totem group was a wrong involving the welfare of the community and endangering the life, liberty, and happiness of both clans.

The object of punishing the criminal, if the community executed the sentence of vengeance, was not to hurt him, but by this

Object of punishment to purge the community. act to purge itself from a curse. The offender was ostracized so that the rest of the community would not be polluted by coming in con-



tact with the things he used or touched. The crime he committed and the consequent guilt would be transmitted to all animate and inanimate objects alike. The water he drank being a part of the community supply would inoculate the latter. The whole tribe would thereby receive in its water supply the guilt of the criminal. The punishment was sufficient if the cause of the danger was removed. Hence by the law of vengeance alone the individual is the only one responsible.

However the greater part of wrongs were handled by individuals themselves for the community had no machinery to administer justice. In this lowest stage, punishment was a mere outburst of anger purporting to destroy the afflicting stimulus. Out of undi-

Distinction between
vengeance and
blood feud.

rected revenge on the part of the individual retaliation by the group followed. The

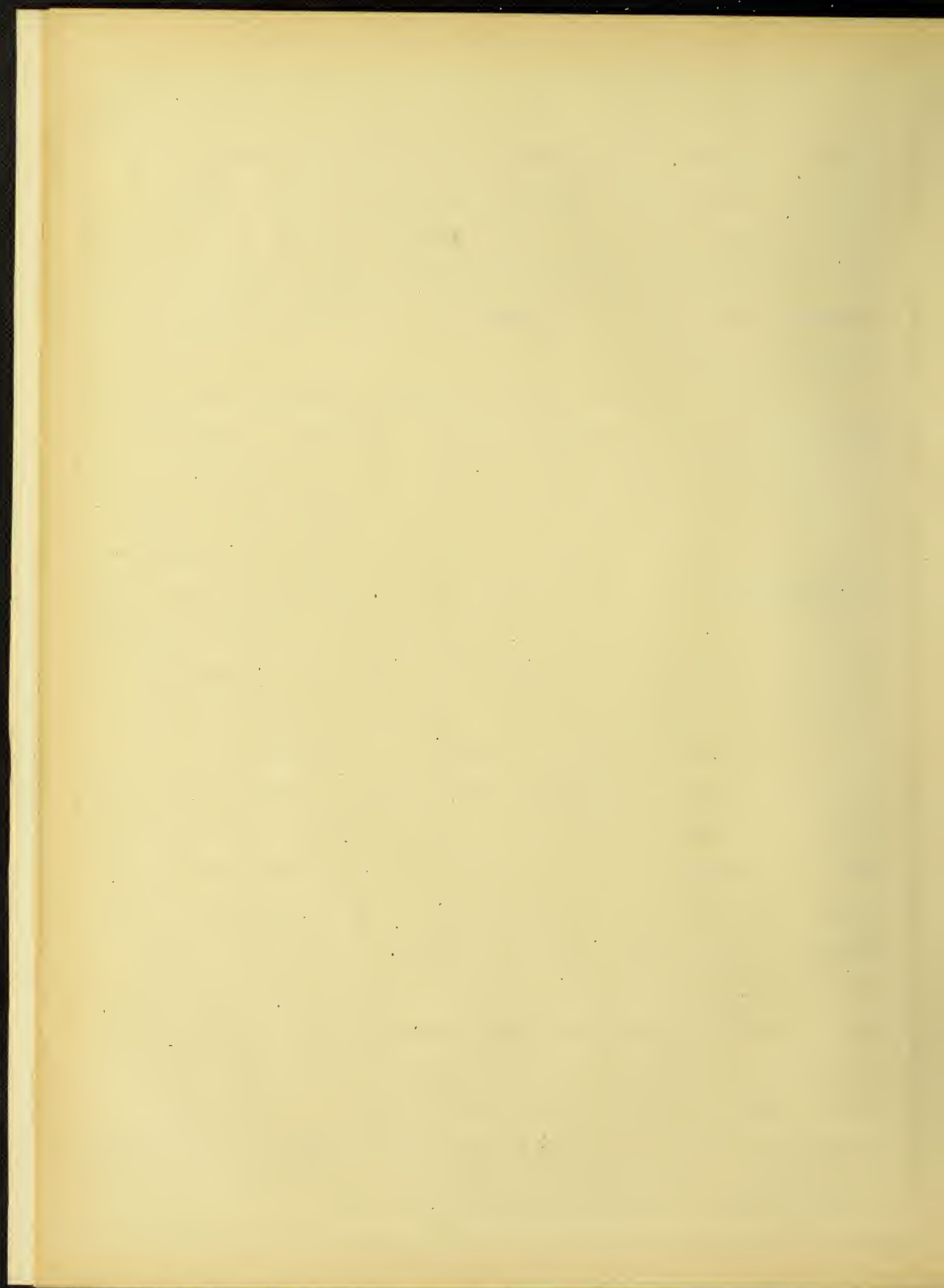
unity of the family gave the injured person

help in the redress of wrongs which affected each member alike.

Therefore the distinction between vengeance and blood feud was this- if A killed B without any cause, C, B's kinsman slew A in revenge for B's death, vengeance was executed. "Feud does not presuppose the right of feud."¹ If A with his kinsman resisted the attack of vengeance, a private war was set on foot which was, in the proper sense of the word, blood feud. "It is that principle of ethnological jurisprudence whereby an entire family is made liable to retaliation and reprisals in kind by another family against which a member of the former family has committed a deadly offence. It is the Lex Talionis exercised between families often including those connected in any kind of blood covenant."² "It is the antagonistic element of the individual warring against the interests

1. Laughlin, J.L. Anglo Saxon Law, 226.

2. Encyclopedia of Religion and Ethics, 2: 720.



of society and levying executions, and exacting blood for blood by the sovereign power vested in himself by the most democratic of all institutions."¹

In its origin blood revenge seems to have been very closely connected with religion. The religious element predominated in

the minds of the avenging party. If
Origin of blood revenge in religion. a man were murdered his ghost sought

for vengeance on his kinsmen, and the only way they could escape was to avenge his death. Sincerely did the kinsmen believe that blood only could satisfy their tribal brother's death for their plaintive cry was that the blood of Abel cried unto God from the ground. Not only was the law of blood revenge common among the Hebrews in the time of the judges and Deuteronomy² "but it existed among all primitive races. The Arabs,³ the Druids, the Brehans,⁴ the Scottish Highlanders and the ancient Celts practiced blood revenge. The law of blood was found among the early Germans,¹ the Italians,⁵ the Swiss,⁵ the Africans,⁵ the Australian aborigines,⁵ the Corsican and Oceanic Islanders,⁵ In England it was possible to choose revenge as a method of redress until the time of William the Conqueror.⁶ Even to-day in our own country of enlightenment the blood feud breaks out in all its bitterness and desolateness among rival families in Tennessee and Kentucky.

Wherever revenge has been practiced, and that is most everywhere the laws of talion in the code of Hammurabi exemplify what was once a common practice e.g. "If a man has struck his father,

1. Laughlin, J.L. Anglo Saxon Law, 226.

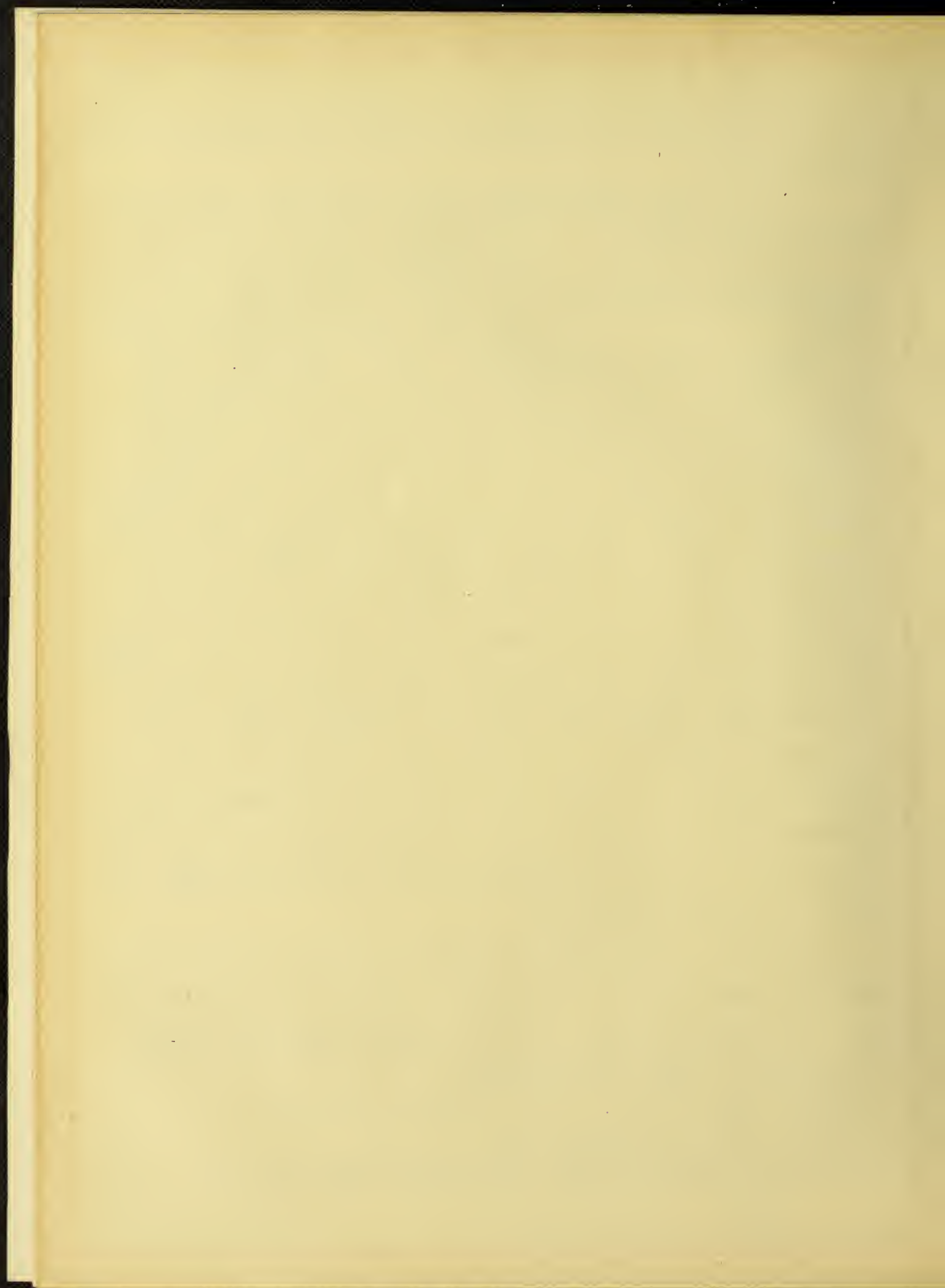
2. Wellhausen, Prolegomena to the History of Israel, 467.

3. Koran, 2: 173.

4. Ancient Laws of Ireland, 3: 84.

5. Westermarck, Origin of Moral Ideas, 1: 477-8.

6. Pollock and Maitland, His. of Eng. before Edward 1st, 48.



his hands one shall be cut off. If a man has caused the loss of a gentleman's eye his eye one shall cause to be lost. If he has shattered a gentleman's limb, one shall shatter his limb.

Illustrations of Like
For Like..

If a man has made the tooth of a man that
is his equal fall out, one shall make

his fall out."¹

If blood revenge were vengeance, it had rules by which it
was administered. There was a rough kind of justice meted out,

Blood feud admits
of a rough kind
of Justice.

but there was no impartial third person before
whom the case was tried and sentence given. A

sympathising kin united in inflicting retaliation,
but justice-rendering to each his due- was not ethically con-
ceived in primitive society. Custom said certain means of retali-
ation were right and proper and as such were carried into effect.

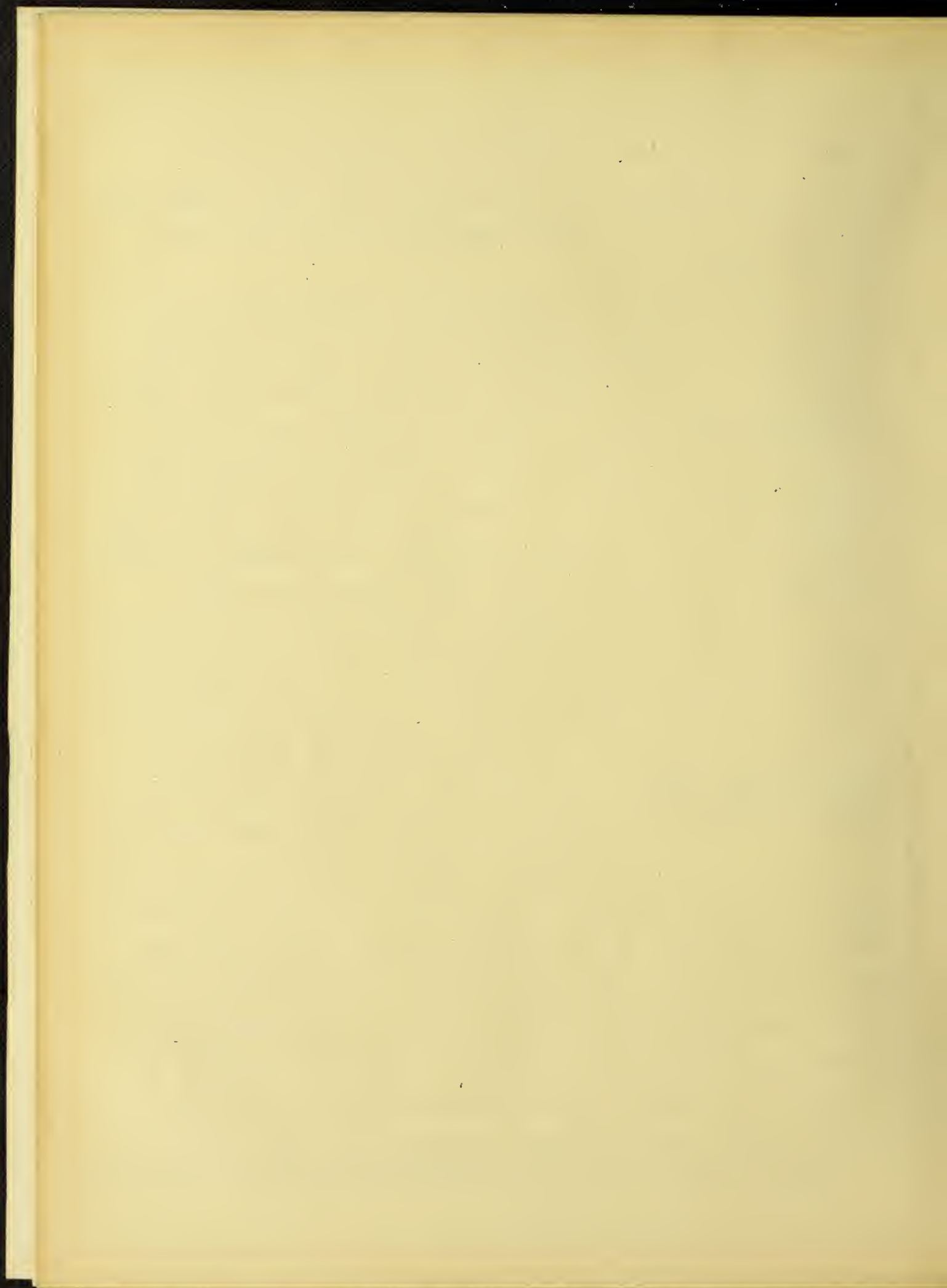
The highest duty a savage was called upon to perform was
that of avenging the death of a relative. If he left his duty un-
done the old women of the tribe would taunt him; if he were mar-

The Weight of Public
Opinion forced the
Moral duty of Revenge
Upon its Members.

ried his wives would not live with him
and if he were unmarried no girl would
speak to him. His mother would bewail and
mourn the day he was born because she had

given birth to a coward and a law breaker. His father would dis-
own him and despise the very ground he walked on, and scorn from
all members of the family in one form or another would be his re-
ward. Among the tribes of Western Victoria a man would slay his
brother for the death of a friend, or a friend for the death of a
brother.* The Esquimos, the Dacotahs, the Guiana and Brazilian In-
dians regarded acts of revenge the highest duty they were called

* Dawson, Aus. Aborigines. Quoted by Westermarck, Or. of Mor. Ideas, 1:479.
1. Code of Hammurabi, Art. 195-200.



upon to perform.¹ In the East we find that Confucius said that it was the duty of a son to avenge the death of his father.² We also find the God of the Hebrews telling Moses that "The revenger of blood himself shall slay the murderer, when he meeteth him he shall slay him."³ Therefore our conclusion is that the enormous weight of public opinion forced a moral duty upon individuals and gave custom the power of "imperative law".

The duty of revenge was a rite necessary to the peace of the spirit because it had been deprived of life and happiness.

Duty of Revenge
a Religious
Sanction.

The soul carried with it a longing for retaliation in kind and degree, and until the crime was expiated it had a restless, turbulent existence in the world of shades. As people did in this matter unconsciously they expected to be done by, consequently the relatives carried out revenge to the letter. Thus the blood of Abel would not be satisfied until punishment was inflicted on his brother, for it cried unto God from the ground.

The tribal honor was alert in the pursuit of vengeance. Blood revenge was carried on to preserve the name of the tribe or person spotless and unblemished, as the bit of poetry, thousands of years old, and sung by a cave man in the heat of the blood feud illustrates-

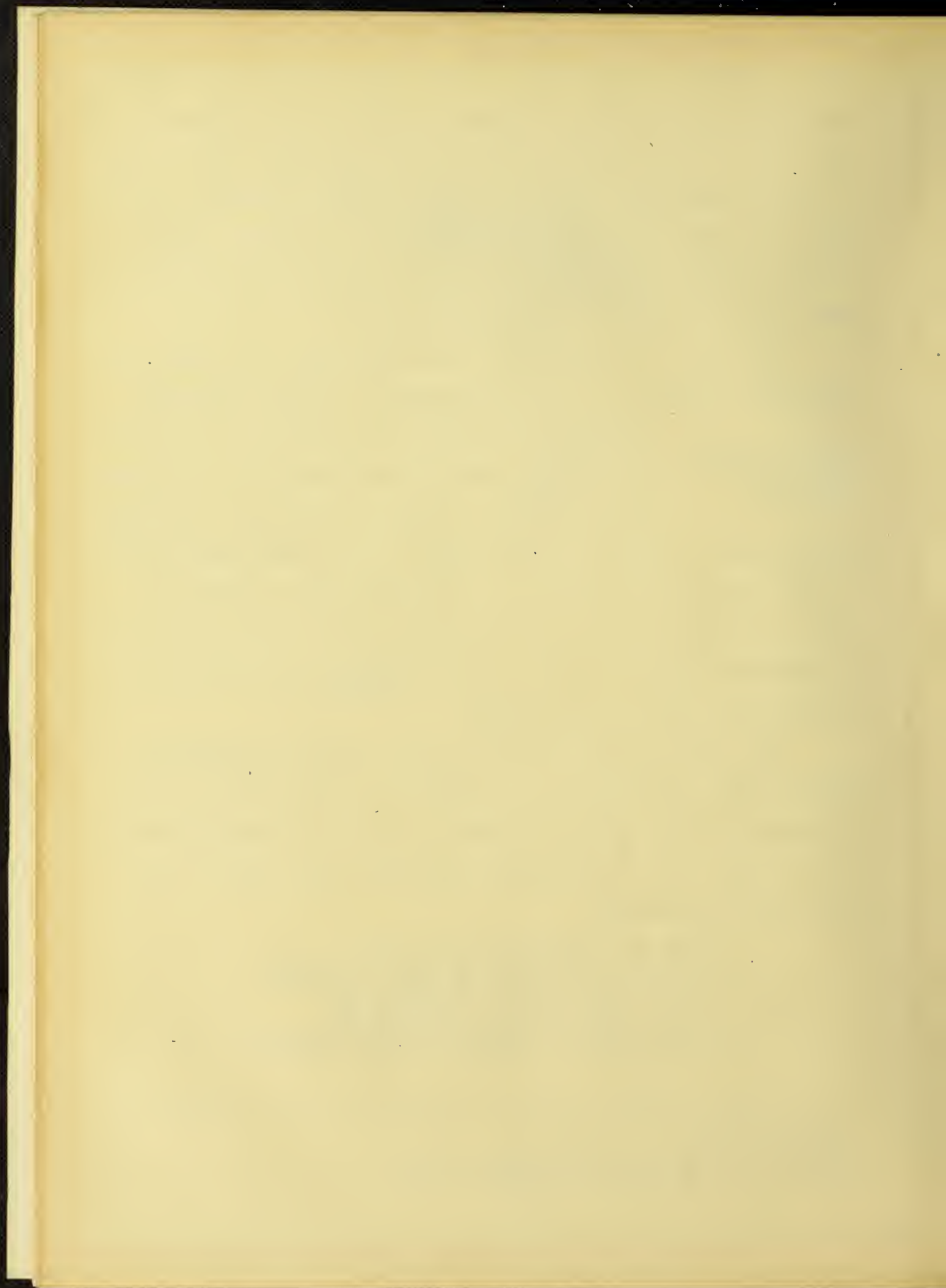
"Adah and Zillah, hear my voice;
Ye wives of Lamech, hearken unto my speech;
For I have slain a man for wounding me, -
And a young man for wounding me:
If Cain shall be avenged seven fold,
Truly Lamech seventy and seven fold."⁴

1. Confucianism and Taoism, 145.

2. Genesis, 4, 10.

3. Tyler, E.B. Contemporary Review, 22, 54.

4. Genesis, 4. 23. Song of Lamech.



Though the law of revenge was common to every primitive society, though the pages of their history were written in blood, though vengeance had its sanction by public opinion and was a religious obligation, it was not by any means practiced in every case demanding that sentence. Among the higher races of savages

Law of revenge
not always
enacted.

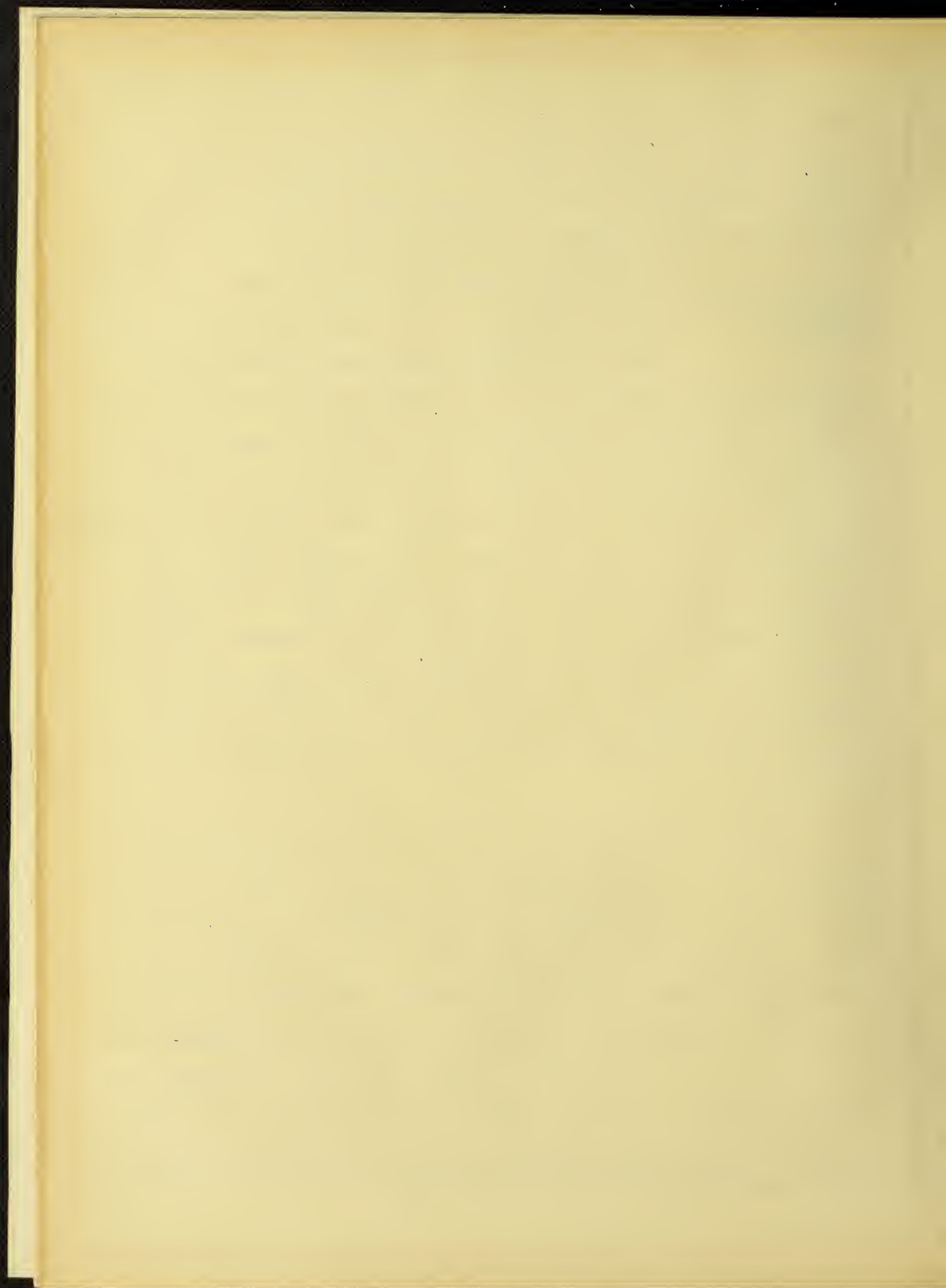
such as the Iroquois, the Dacotahs, the Incas, the death of a member of the totem group was in many

cases left unavenged and was frequently passed over with slight punishment.¹ On the statute books of every city even are laws which if enforced would put every flagrant criminal in the penitentiary. Why then did and does society not enforce its laws? Possibly the criminal himself is the leader of public consciousness, as to what is worthy of punishment. But in early society the greatest factor in the non-enforcement of revenge was the organization of the tribe itself. The clansmen could not afford to run the risk of losing other warriors, weakening their efficiency and putting themselves at the mercy of the stronger enemies. Hence vengeance was unenacted on the grounds of prudence and utility.

But the wild spirit of freedom and pride, forbidding all resistance, led to consequences direful to the state and to individuals alike. The destruction of life and property, laying waste whole villages, and the conversion even of whole countries into a state of decadence often were necessary concomitants of the vengeance war. Mr Harris estimates that on one of the vengeance wars

in the Fiji Islands the loss of life was from Destruction of life and property. fifteen hundred to two thousand," not including the women who were strangled as soon as the death of their hus-

1. Westermarck, Origin of Moral Ideas, 1:483.



bands was reported."* Their purpose was not defeat but actual extermination. If no men were found the attack was made on defenseless women and helpless children, especially where there was a superstitious feeling for the collection of human skulls.² In speaking of South Eastern Africa, Mr Harris pictured the destruction left in the wake of a vengeance raid in these words: "Whole tribes have been drawn, root and branch, from their dwelling places, to disappear from the earth, or to wander with varying fortune over illimitable tracts, driven by the inexorable arm of hunger. Therefore for hundreds of miles no trace of native industry meets our eyes, nor does any habitation, - never ending wars present the picture of one uninhabited wilderness."¹

Added to the economic backwardness of the countries in which the law of revenge is in force, human life itself has little value. Indiscriminate rapine and murder, amputation of hands and

Vengeance produces stagnation, retrogression, and fear in dealing with others.

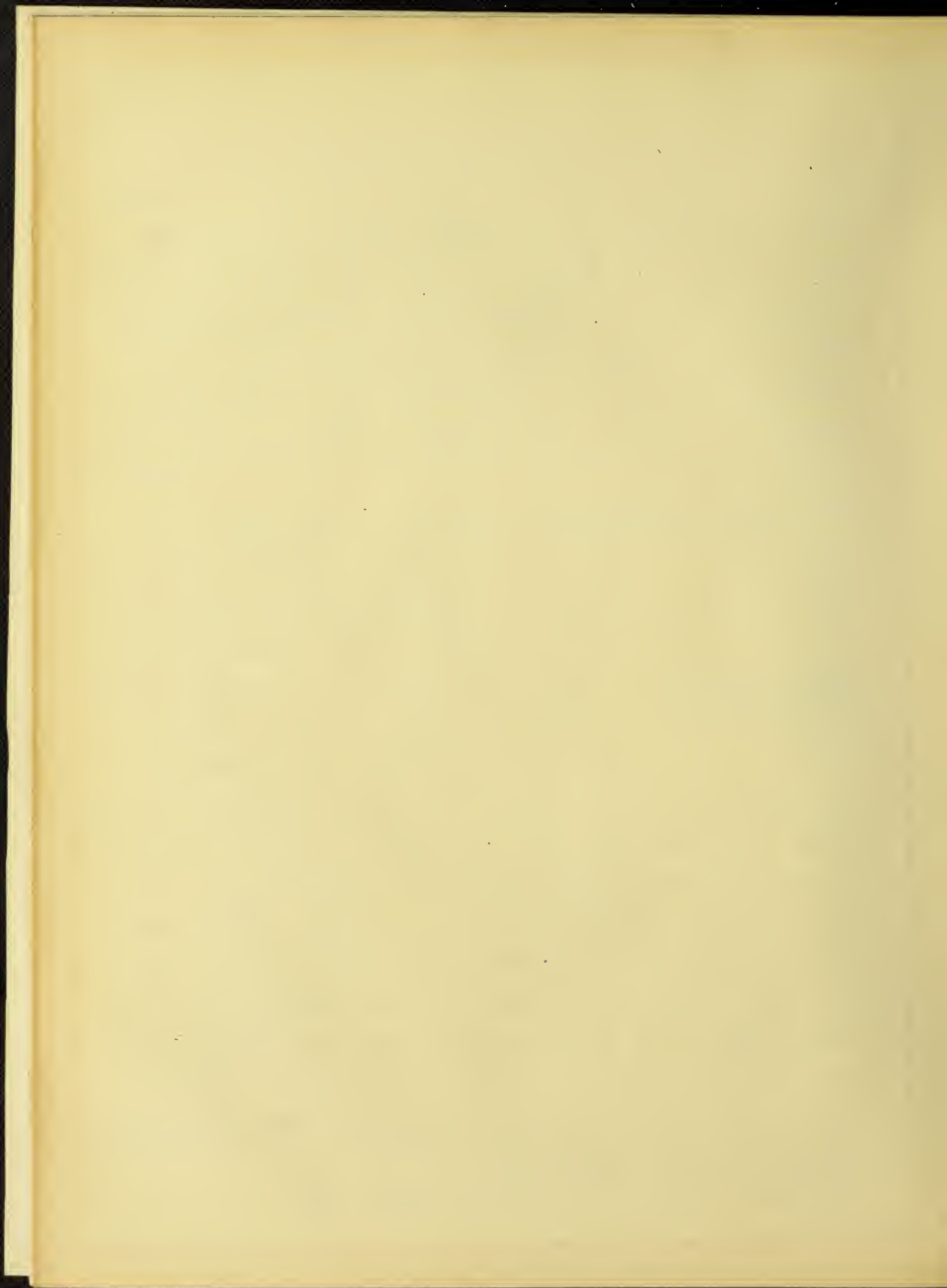
feet, cutting off of the nose and the ears, gouging out of the eyes, and ingenious mutilations are common practices. Mutual help

and co-operation have drawn civilization from barbarism but these factors are decidedly negligible with the latter. "The forces which make for culture both within and without are alike weakened and the consequence is stagnation and retrogression."² Trust in fellowmen, peace and security and the sanctity of the pledged word are scattered and trampled beneath their feet. Their relations with other tribes are characterized by the "lowest qualities of mistrust, treachery, and recklessness."² Trickery and intimidation are their standards in dealing with others on account of which they are constantly filled with fear and insecurity.

* Ratzel, History of Mankind, -116.

1. Thomas, W.I. Source Book of Social Origins. 758.

2. Thomas, W.I. Source Book of Social Origins, 759.



Cannibalism was another standard of dealing with tribes outside of the totem group. Tribes in the lowest degrees of civilization practiced the ceremonies of the cannibalistic feast. The Ty-

pees,¹ the Solomon Islanders,² the Maoris,² the Fijians, Cannibalism.

the ancient Chinese,³ and the inhabitants of Natal⁷ and Tibet danced around their camp fires torturing their captured enemy before they devoured him. However cannibalism was not altogether carried on as a means of food supply. The Maoris ate human bodies for the extreme vengeance which they thought was thereby carried out. The Fijians in any transaction where the national honor had to be avenged considered it " a duty they owed to their exalted station to avenge the insult offered to the country by eating the perpetrators of it."⁴ In any case "it was always some one of the enemy who had been notorious for provocation of cruelty, and that eating a part of his body was considered the climax of hatred and revenge."⁴

An act of vengeance perpetrated in this way surely was common to savages in the lowest stages of barbarism only. Though

it was one of the lowest and most degrading rites
Morality of cannibalism. of our primitive ancestry, certain moral values arose

from it in the mind of the savage. They believed that the warriors eating the enemy would take unto themselves the

qualities of courage, fortitude, perseverance, strategy,
a. Increased efficiency. patience, and wisdom.⁵ Moreover it was the greatest expression of hatred and insult to utterly annihilate the victim's

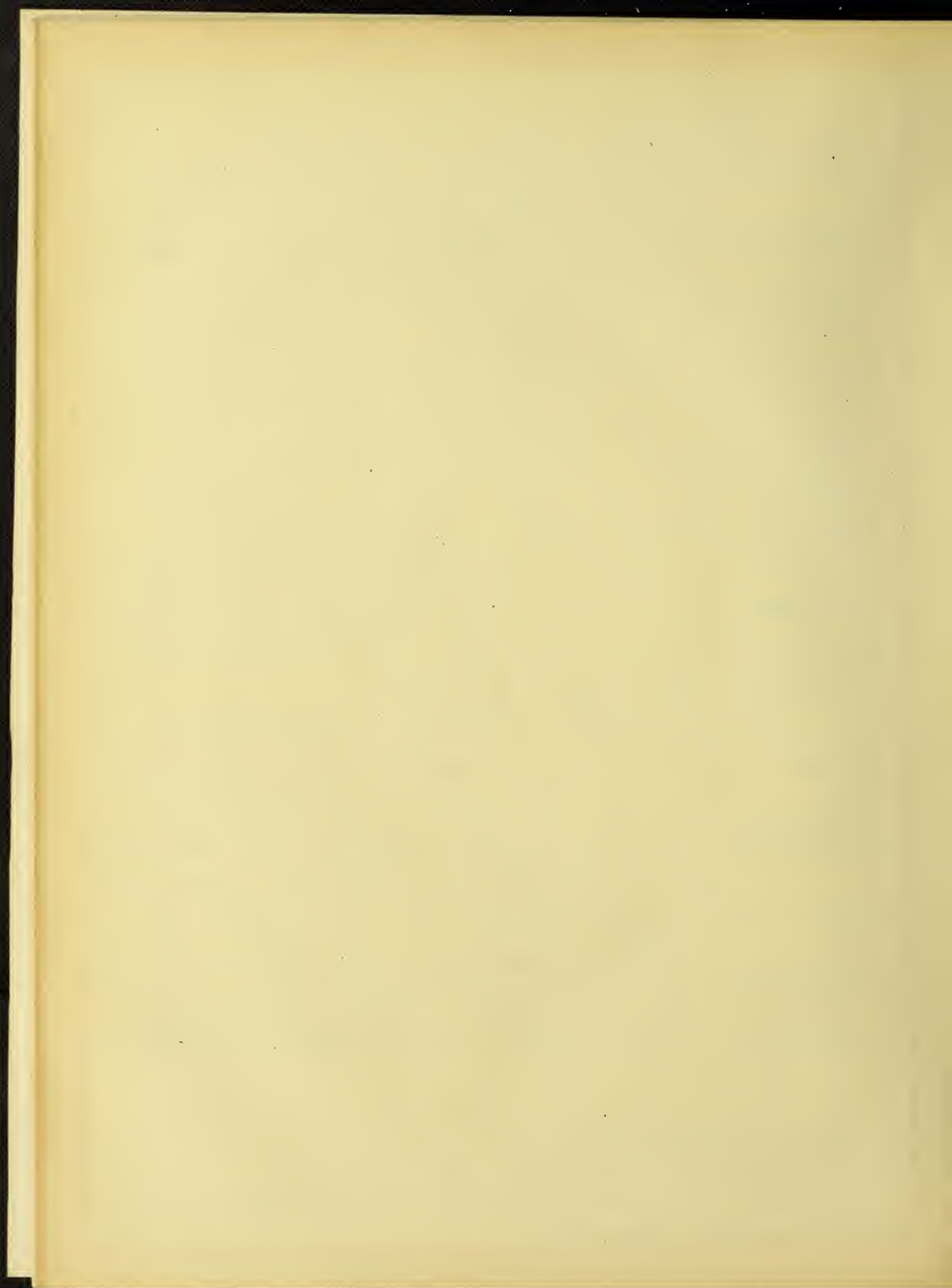
1. Melville, Typee. 181.

2. Westermarck, Evolution of Moral Ideas. 2:255.

3. K.A. 1.20:116.

4. Seeman Viti, Quoted by Westermarck, Ev. of Moral Ideas. 2: 578.

5. J.A. 1.22.161. Isaiah, 45:4.



body by eating it. It is hard for mankind at present to see with what triumphant satisfaction the fiendish beings held their captives

b. Act of insult
and expression
of hatred.

between their teeth and literally drank their blood in merry glee. It was one of the causes

which kept savage people more barbarous than their neighbors, and "of all the beast-like traits in the moral physiognomy of man" it was the most beastly.

Long before the establishment of the idea of justice such a common practice was relegated to the dim but cruel past. In the transition, cause of sympathetic resentment at the annihilation of the body and the deprivation of the eternal pleasure of the soul, must have been operative. At any rate savage society took a long stride upward when it refused to sanction a practice that had been a custom.

As cannibalism was one form of revenge, suicide might be termed another. "Should a person commit suicide and before doing so attribute the cause of the act to the conduct of another person, that other person is by native law required to undergo a like fate."² The practice is termed, "killing ones self on the head of

Suicide a
form of
revenge.

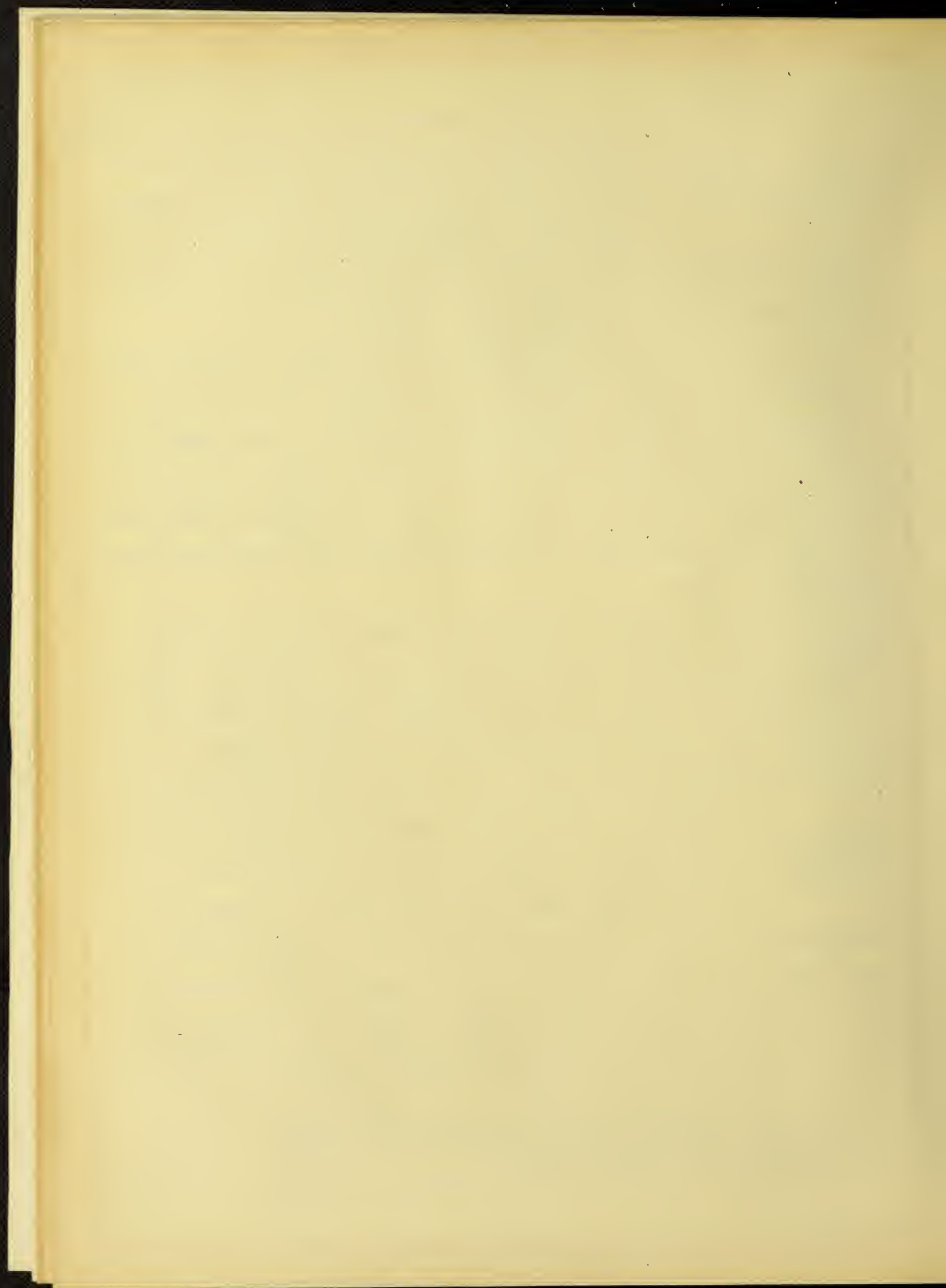
another." The savage islanders, like angry children are tempted to avenge themselves by picturing the trouble that they will bring upon the friends who have offended them."³ The Thlinkets who cannot take vengeance in any other way commit suicide in order to expose the offender to the vengeance of their relatives and friends.⁴ The Chuvashis angered by the deeds of their enemies hanged themselves at the lat-

1. Westermarck, Evolution of Moral Ideas. 2: 578.

2. Ellis, Tshi Speaking People of the Gold Coast. 302.

3. Thompson, Savage Island. 109.

4. Westermarck, Evolution of Moral Ideas. 2: 234.



ter's door.¹ The Votyaks believed that the ghost of a hanged man would take vengeance on him who caused the man to take his own life.

The ideas of morality involved in suicide add a few more to the ethical significance of revenge. From a study of suicide among primitive races it is evident that no stigma of disgrace was connected with it. Even the opposite

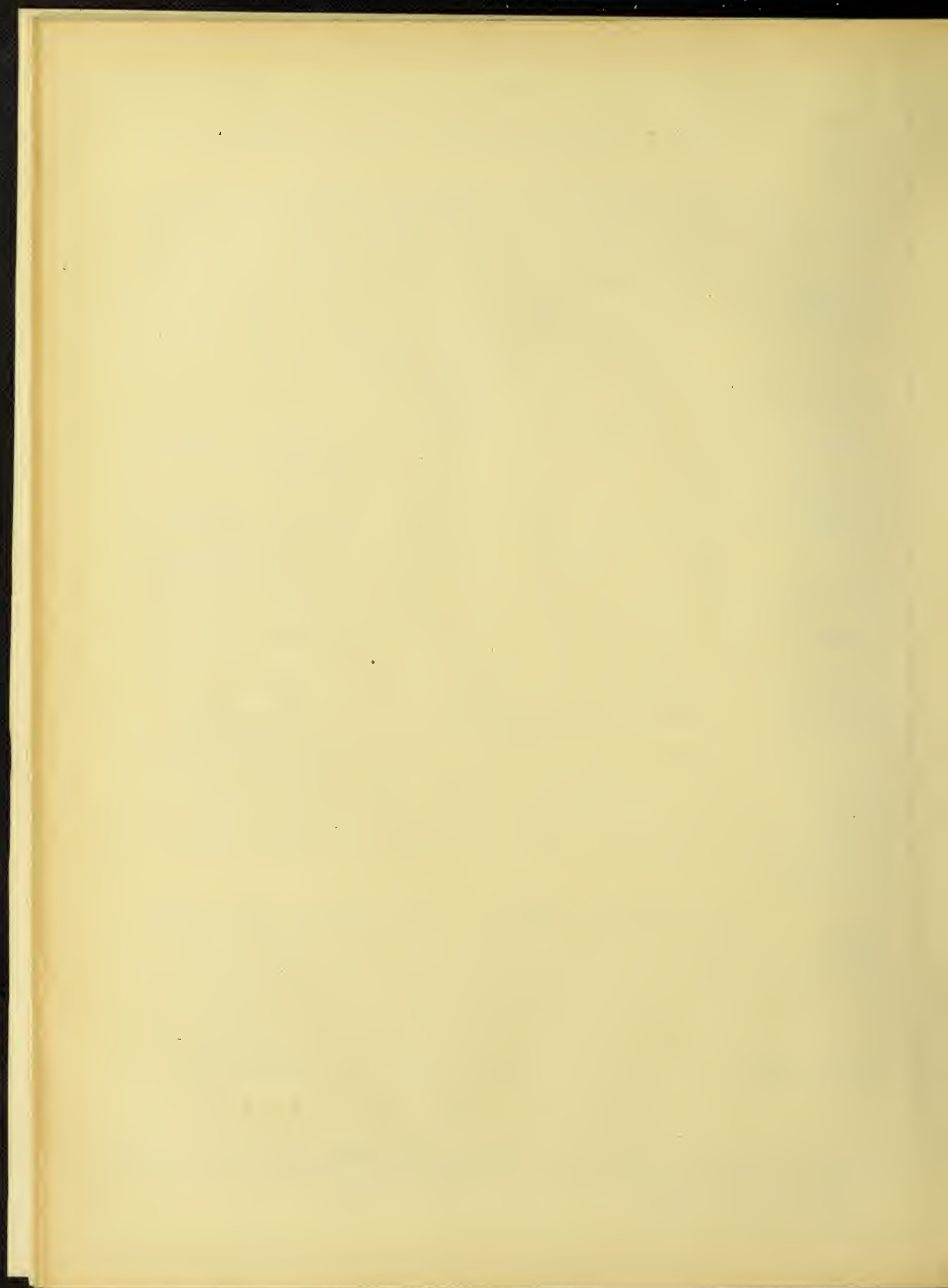
seems to have been the prevailing idea, i.e. suicide was a praiseworthy act. Suicide opened the doors to a happy future beyond into which savages did not fear to tread. They regarded it as a place in which the heroes and warriors would find an unbounded expansion of the things which gave them the most happiness on earth. However by the increase

in civilization suicide as an act by which happiness was obtained changed until it was regarded as an act of cowardice. But it is impossible to say when and what occasioned the change. However suicide as an act of cowardice was a long time in coming.. It may still have been committed as an act of vengeance, but the tribe looked at it in the light that the one who had killed himself was afraid to fight for his rights.

It would seem that justice to the tribe had been reached when it declared the act of suicide as cowardly and therefore prohibitive. Society has only partially taken hold of acts of self-murder, for even to-day it is regarded as an act of cowardice and a sin against God. It is not enough to say "Thou shalt not kill." Before we can say that each individual receives his dues, and thence

Justice has not been reached in suicide.

1. Westermarck, Evolution of Moral Ideas. 2:234.
2. Reg Veda. 11. 28-9.



society, Society must take sufficient care of its members by removing the conditions which cause self-inflicted death.

The laws of revenge had their sanction in the author of the totem group whom the savages worshipped as their god. Therefore it was only natural to think of the gods as divine avengers.

They were less discriminate in punishment than men, Gods are divine avengers. for the individual was held responsible for the sins of the other members and they in turn as a whole were responsible for the misdeeds of any and each member of his social group. God visited the sins of the fathers on the children to the third and fourth generation. Recognizing that principle an oriental in one of his prayers asks for absolution:—"What misdeeds we ourselves have sinned, in mercy pardon. My own misdeeds in mercy do thou, O God, take from me, and for anothers sins let me not suffer."² The divine theory of retribution among the Greeks made the community suffer for the sins of its members,³ as did the fact that "the anger of the Lord was kindled against the children of Israel,"⁴ for the sins of Achan, or because Saul slew the Gibeonites a three years famine was sent upon the land.⁵ Among other races God was also regarded as an avenger. The Australian All-Father is represented as the guardian of morality punishing the wicked and rewarding the good.⁶ The natives of Queensland believe that divine vengeance will be wreaked^{by} Kohin, who roams over the milky way, on any one who has failed to wear the sacred necklace or marry within the family group.⁶ The customs of the Japanese in the past were as unalterable as the laws of the Medes and

1. Westermarck, Evolution of Moral Ideas. 2:234.

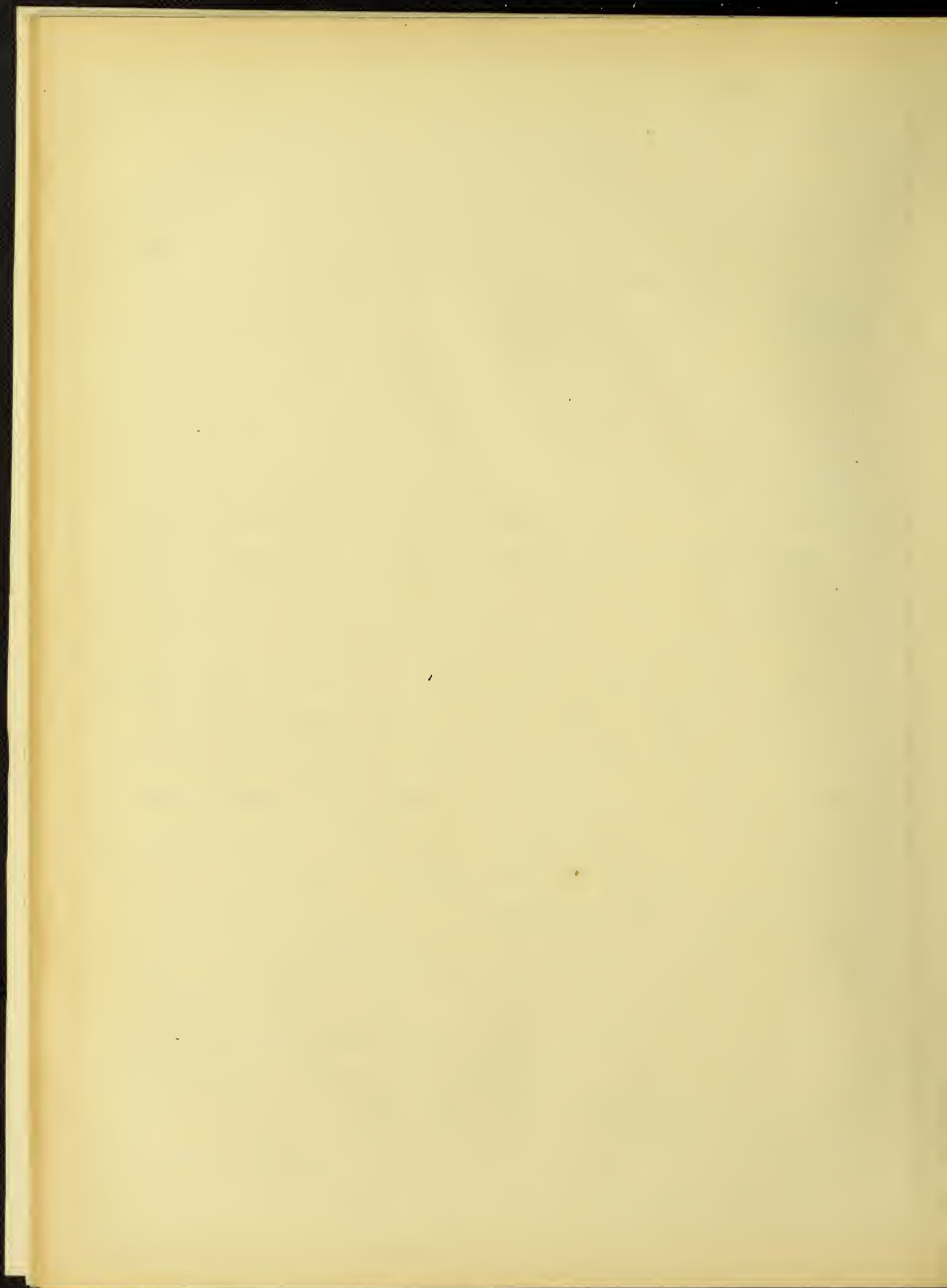
2. Bag Veda. 11; 28-9.

3. Farrell, Cults of Greek States. 1:76. Quoted by Westermarck. 1:49.

4. Joshua. 7:1.

5. Second Samuel, 21:1 ff.

6. Westermarck, Evolution of Moral Ideas. 2:670.



Persians for the reason that their god was the source of everything in their tribe and therefore the avenger of his own acts if the nation did not carry them out.¹

The very idea that God would and could avenge the breaking of any of his laws gave the laws of the tribe a sanction and a machinery of enforcement that is in a way comparable to the mod-

Value of God
as a divine
avenger.

ern state. Since there was a common law of that character, the tribes of the same totem were

more likely to be united. They acted under a common authority, they owed their spiritual and political guidance to a common leader and protector, hence the bonds of patriotism forged a chain around them which gave the members strength. God not only dealt with the individual who broke the law, but with the nation as a whole. Therefore it was highly imperative that each member of the group serve as his brother's keeper, and that all look out for the interests of each. The moral level was consequently higher than if there were no superstitions or supernatural tribunal and a religious sanction for the laws, the most important of which were the laws of vengeance.

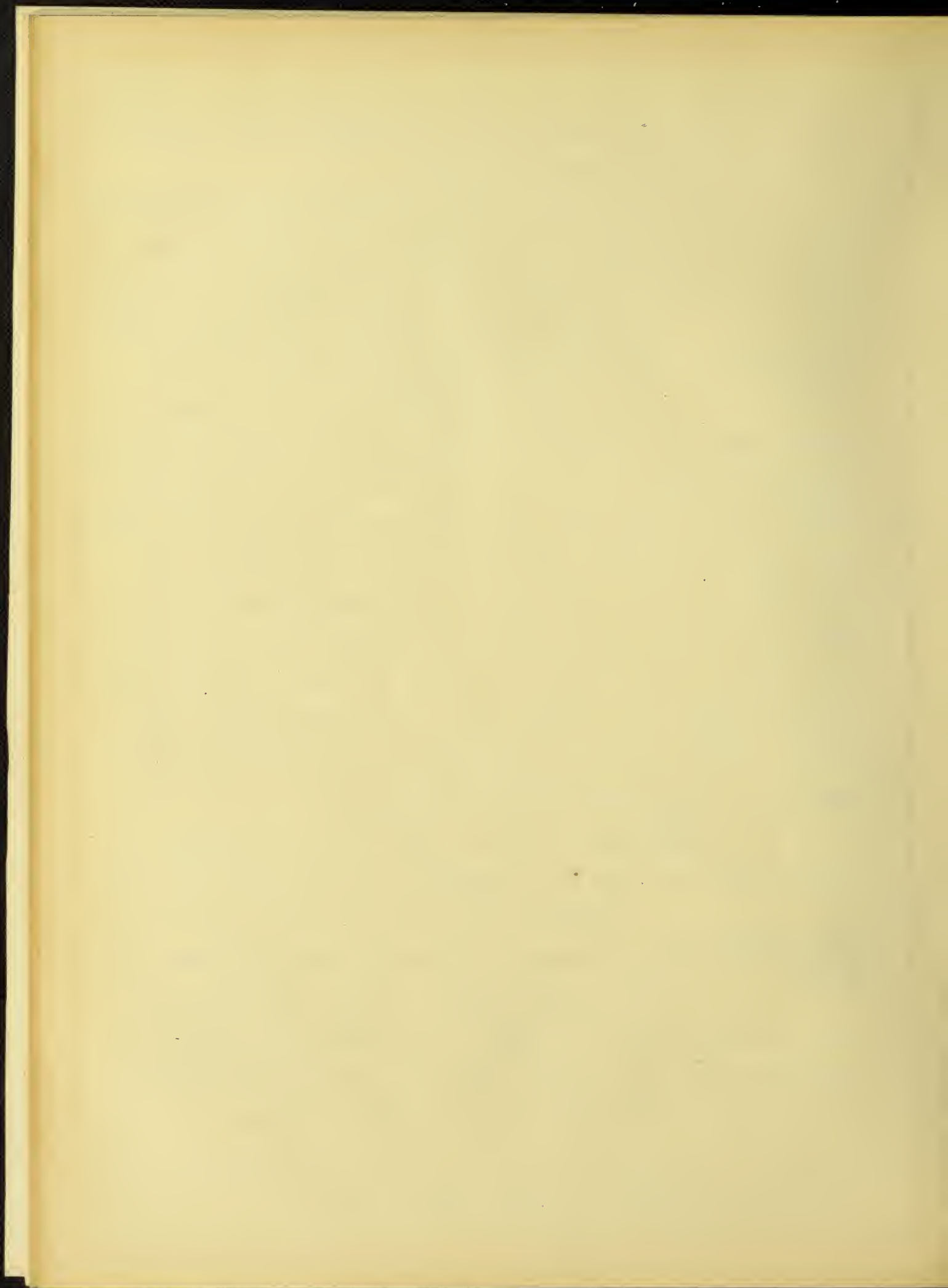
It is impossible to tell how long the law of revenge in its simplest form remained in practice. We can no more tell when

When revenge was
mitigated not
known.

revenge became ameliorated than we can tell when men of the rough stone age began to use polished weapons to fight their battles.

But it is certain that long ages in the dreary war of life elapsed, ~~for life passed~~ before the process of mitigation grew strong enough in the minds of men to become a custom.

1. Westermarck, Evolution of Moral Ideas. 2:670.



However in the establishment of such a custom, society stopped in as a check on the unbridled and blood thirsty feelings of the offended. The myth songs of the Greenlanders and the Austrian duel are illustrative of the control exercised by the public.

With song and
duel are forms
mitigated blood
revenge.

If a man had been injured he invited the offender to a meeting of the tribe at which both parties by turn sang spiteful and satirical songs about each other; songs representing

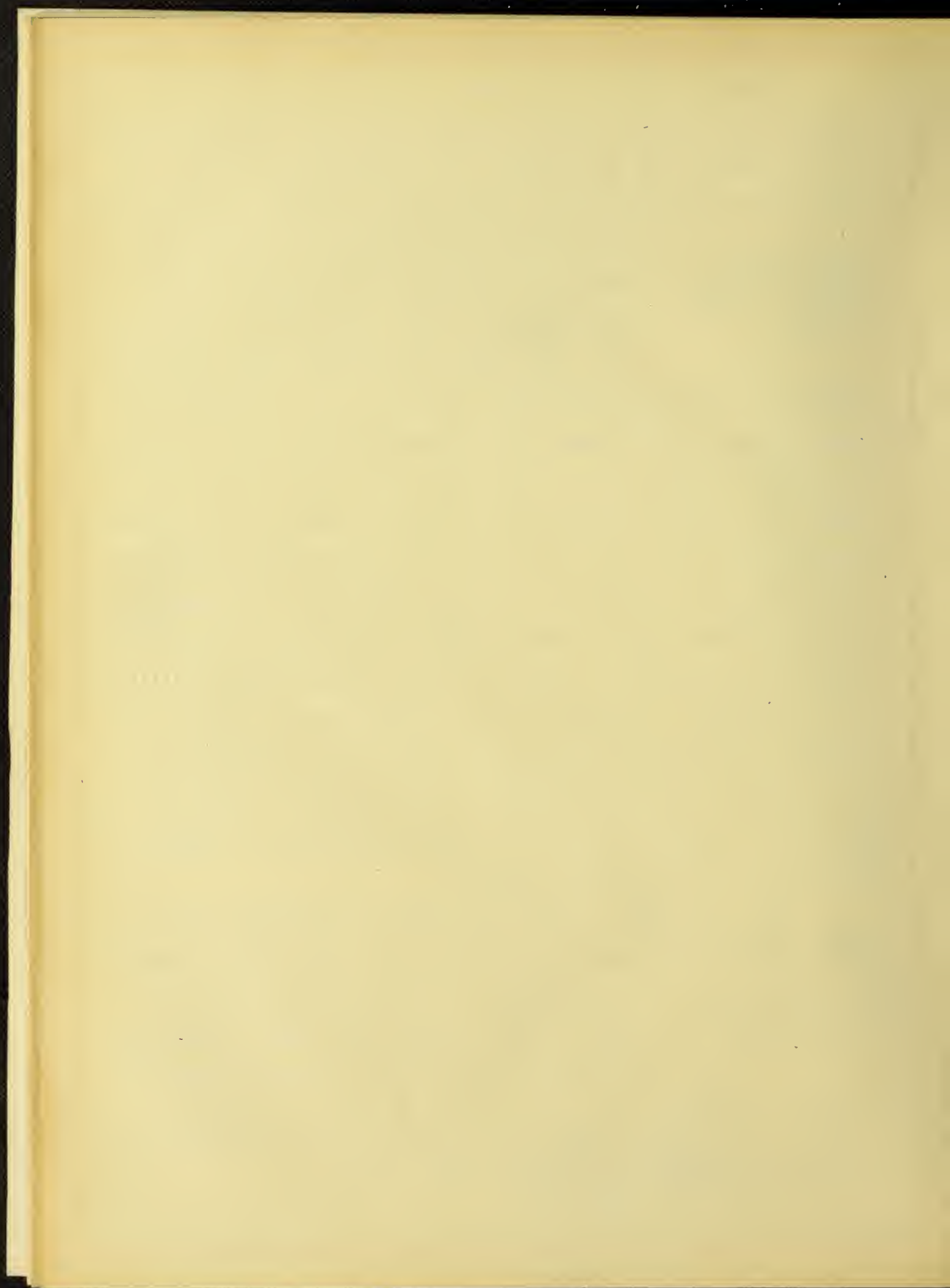
their evils, misdemeanors, and crimes. The one who provoked the most laughter and merriment was declared by the council in charge the winner.¹ Or "when one black fellow carries off the wife of another, the injured husband and the betrayer meet in mortal combat; and the spear that spills the life blood repairs the wounded honor of the one or justifies in the eyes of society the crime of the other."² The duel is common between individuals who have quarrels to settle, a certain number of spears being thrown until honor is satisfied.² Should one of the participants be killed, the survivor, unless he can give good reasons for the death, will be put to death in a similar manner, at the instance of the camp council and usually undergoes the extra degradation of digging his as well as his victim's grave."³

The myth songs are regulated duels of wit against wit, which are substitutes for the direful blood feud. The new means of punishment is the conserving force of a people whose energies were spent in ceaseless and useless warfare, and whose best blood was dissipated in fight. The duel is based in part on sympathetic

Duel an advance
over revenge.

of punishment is the conserving force of a people whose energies were spent in ceaseless and useless warfare, and whose best blood was

1. Nansen, Esquimo Life. 186.
2. Westermarck, Evolution of Moral Ideas. 1:500.
3. Northwestern Queensland. 139.



resentment, the relations of one person to another and to the tribe, on the recognition of some rights to one, and on certain obligations to others. The duel shows the superiority of strength and skill where

(a) Conservation of race by being regulated.

there is no government, or where it is very weak. It is a higher degree of punishment than "downright violence calculated to bring about a definite arrangement"¹; and it is a mere sham fight which may serve as a preventive against infliction of more serious injury, by showing which party is the

weaker and as result has to give in. The duel is a method of reaching the offender who might otherwise be out of reach and thus lessen the damage to whole families by taking away the feud.

(b) Recognizes rights.
(c) Serves as a preventive of injury.
(d) Brings the criminal to responsibility.

"Moreover the duel may be preferable to an act

of revenge as a means of wiping out an affront and satisfying the claims of honor; it displays more courage; it commands more respect,"² But the sting of defeat is more intense

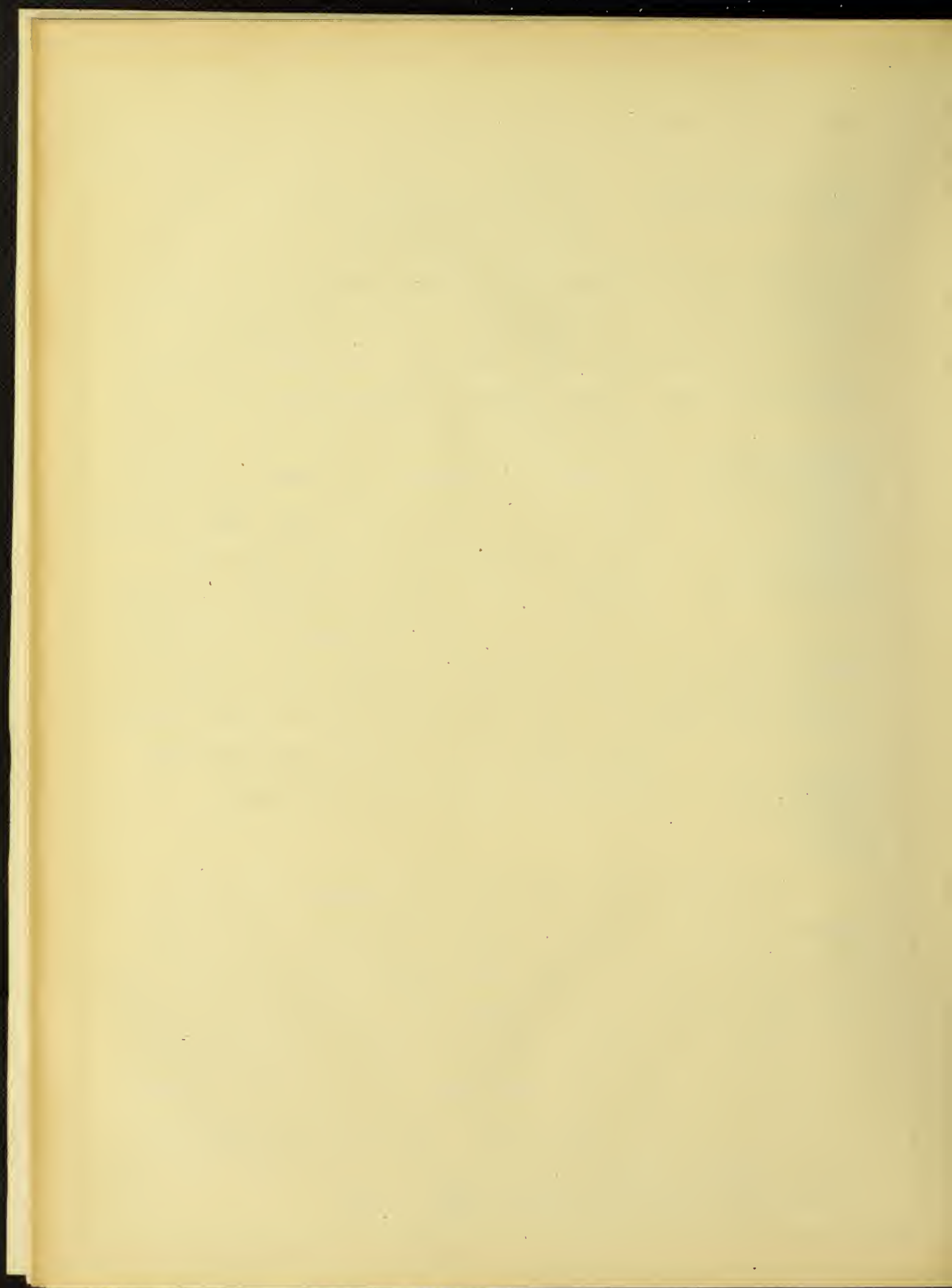
because the loss of a battle would have been distributed among the whole war party.

(e) Takes more courage.
(f) Sting of defeat greater.

Blood revenge has reference to punishment inflicted on members of the "out" group. Mitigated revenge as I have shown was a distinct advance in the moral status of the relations between the offended and the offender but a relation still between the "out" and "in" groups or between totem and non-totem tribes. We now propose to deal with punishment inflicted on the members of a tribe by its own organization. Since that punishment was

1. Roth. Northwestern Queensland. 139.

2. Westermarck, Evolution of Moral Ideas. 1:503.



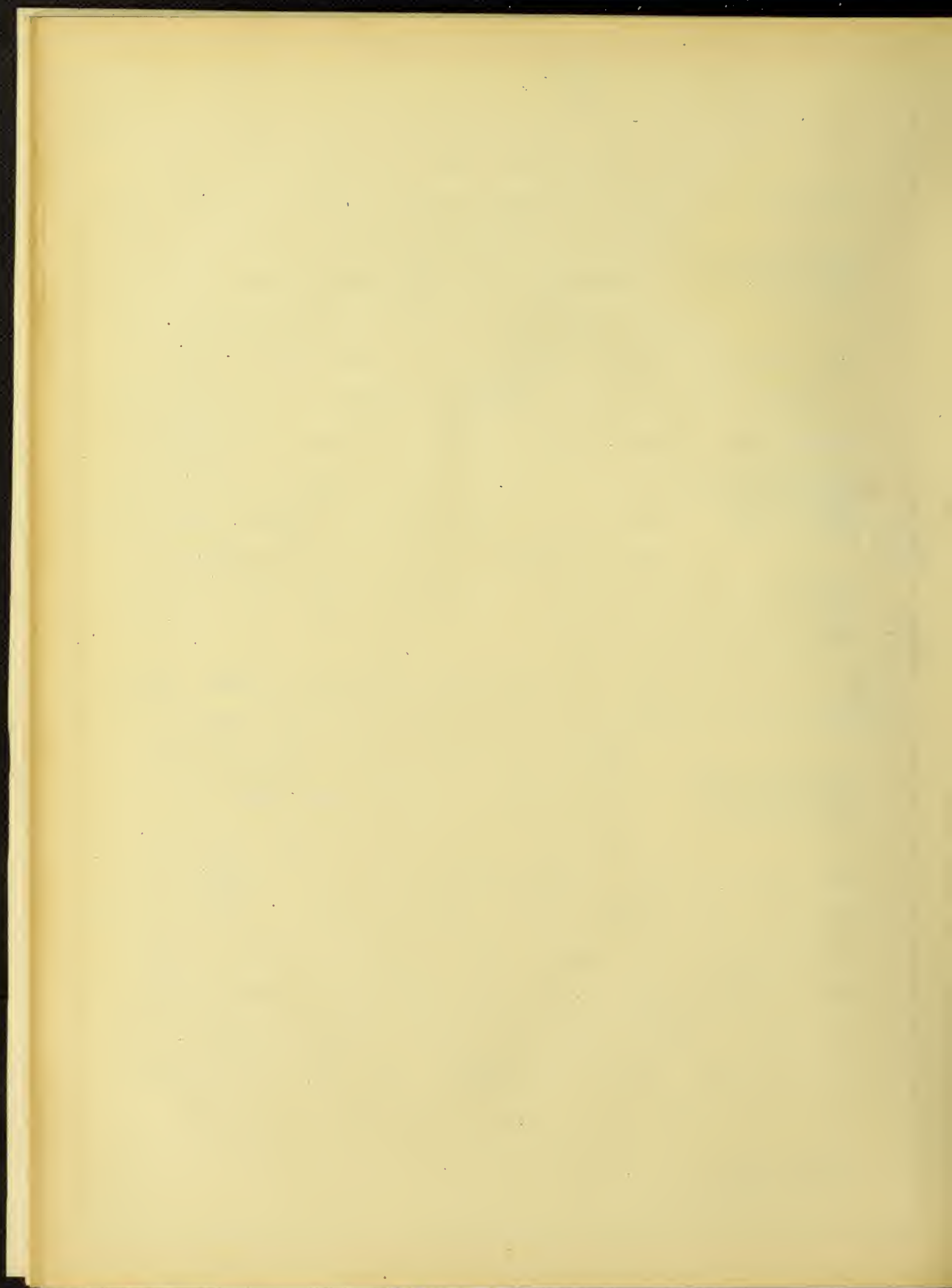
never so cruel and bloody as revenge, because it was inflicted on its own members. We place that discussion in this part of the essay.

Did a man transgress the laws of his own tribe? Yes is the answer. He committed offenses worthy of death which was inflicted by expulsion of the guilty member into the Exile resulting in death. territory of the enemy where he was sure to be killed. Since the exile was an outlaw, untrusted by and a criminal among his own people, he would even be worse in a strange camp argued the enemy and therefore it was their duty to kill him. Though the exile paid his penalty in death, the tribe was answerable to God himself, whose laws had been broken. Tribe answerable to God. which placed responsibility on every member. They must set themselves right with their Ruler, by offering one of their number in sacrifice rather than that the whole tribe should perish.¹

We have reason to believe that the right of human sacrifice was soon replaced by that of substitution, for motives of communal love and sympathy soon grew to be strong enough to demand some other form of expiation. At any rate, though many lives were sacrificed, the idea and practice had to be discarded when the family had expanded until it was impossible to distinguish an outsider and a tribal member. For in the time of David it was admitted that a crime calling for expiation was committed by Saul when he slew the Gibeonites, sworn allies of Israel.² But the Gibeonites demanded satisfaction under the law of revenge and asked in lieu of Saul certain members of his household.

1. Deut. 21:2.

2. Second Samuel, 21.

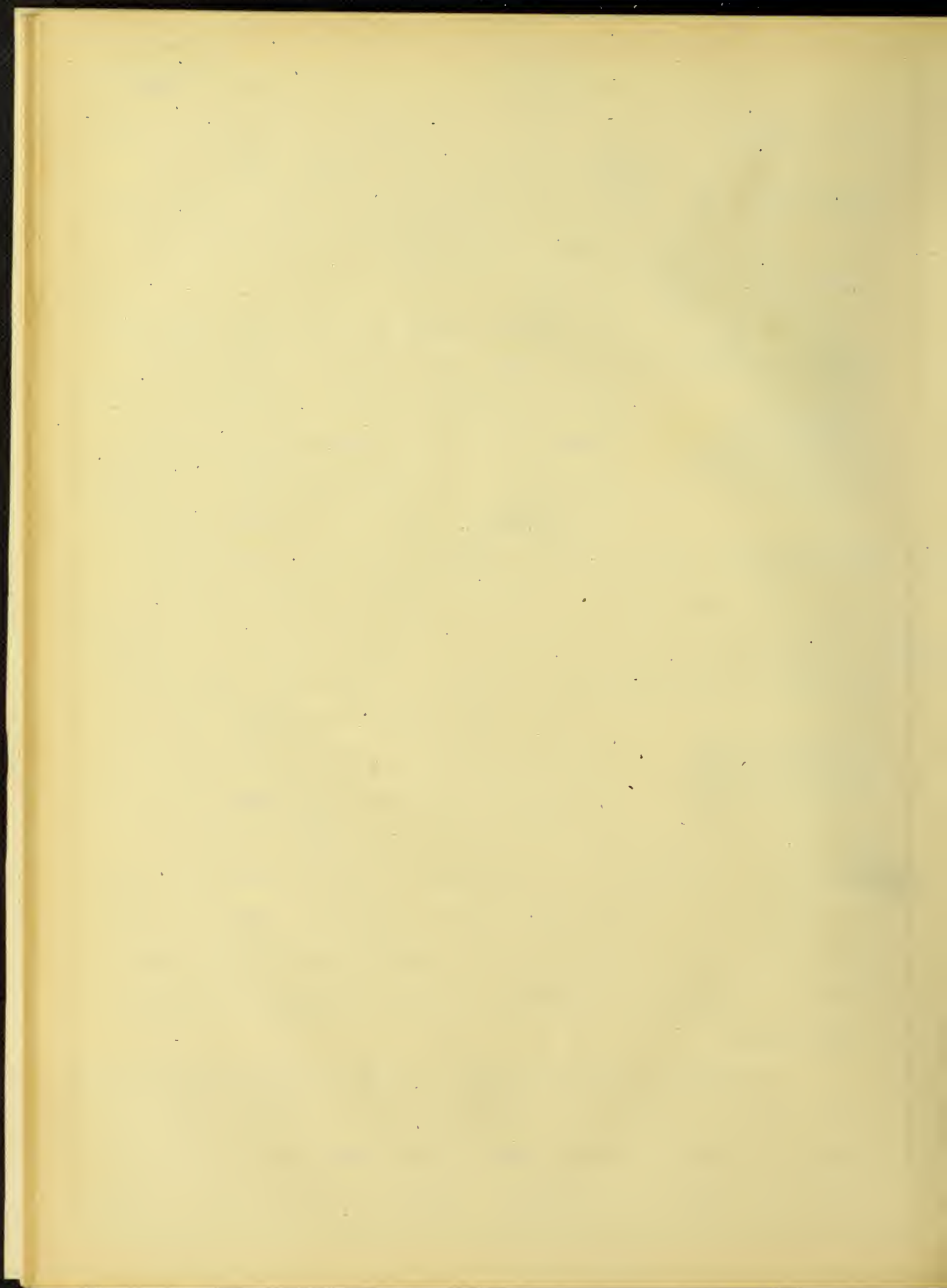


Atoning rites whether in human or animal sacrifice were purely physical in their purpose in as much as the murderer could not be restored to his original position by being cleared from his guilt and in as much as the blood of the victim was washed from the hands of the tribe as a whole.

However the rites served to keep alive the sense of divine justice and righteousness. But " the sacrifice practically became an execution and was interpreted as punishment laid on the community by its God. The ceremony was wholly deficient in distributive justice, that is it was calculated to perplex rather than to educate the growing sense of morality."¹

The growing sense of morality depended on the principle that the community was responsible for the holiness of its members and that it was compromised by crime. In other words this principle laid the basis for the future teaching of the prophets- a community heart and soul of righteousness. This conception, common to all primitive people, must be individualized before there is a transition from physical to spiritual religion and the sinner made to know that he is responsible for his own guilt. When he is held responsible for his own sins by the community and receives dues from the violations of the laws, justice is brought into moral consciousness.

In discussing the punishment of members of the tribe by the tribe itself it would seem that it was done on a wholly religious basis. But there is another point of view from which we may gain additional light on the problem. Suppose an offender were not ex-

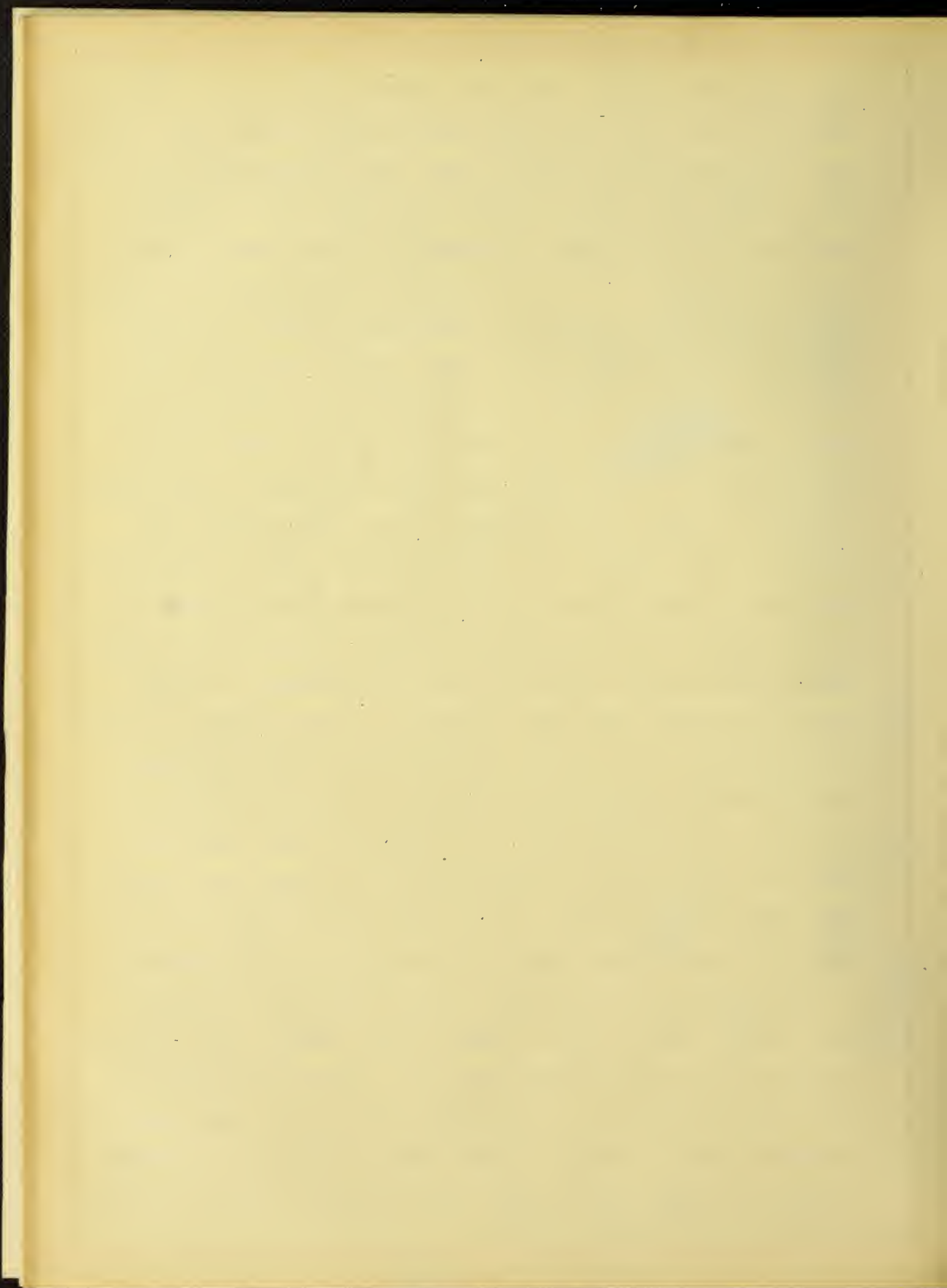


iled. What would happen then? Would indiscriminate murder follow? Murder of itself must have been neither right nor wrong but a non moral act. Among most primitive men it was praiseworthy and allowable. However that state of affairs was conditioned by defense, sacrifice, war, or revenge. Practically no tribe was so deep in

Tribal solidarity makes it necessary for no murder in the tribe, and justice is reached when that idea is universalized.

the mire of savagery as to allow promiscuous murder. Was there then a moral law of thou shalt not kill? On the one hand there

seems to have been and on the other the opposite seems to have been the case. The young Si^oux brave must have gone out and killed a warrior in order to be considered a man of valor worthy the society of the Braves.¹ The Dyak of Borneo could not get a wife until he had taken the head of an enemy or a luckless stranger to her as a dowry.¹ Yet the Sioux hold murder unless committed in a vengeance war to be a crime, as also do the savages of Borneo. The tribe therefore used such a standard to put a premium on valor in the slaying of its enemies, but it did not allow such a practice perpetrated against any of its kin, else tribal solidarity would have ceased. The law of 'thou shalt not kill' was not a higher law degenerated, as some have said to support the claim that savage races were once in the possession of a higher civilization. The most natural way of accounting for it, when applied to the "in" group is to say that it was inexpedient and impractical for the tribe to put to death its own members. The influence and power from group solidarity was well understood by primitive man, and has passed on to every higher civilization. Even some of the words, such as "hostis" retain the old meaning of a stranger and hence an enemy. Yes, and some ideas of group unity and solidarity. Tyler, 3." Cont. Rev. 21:714.



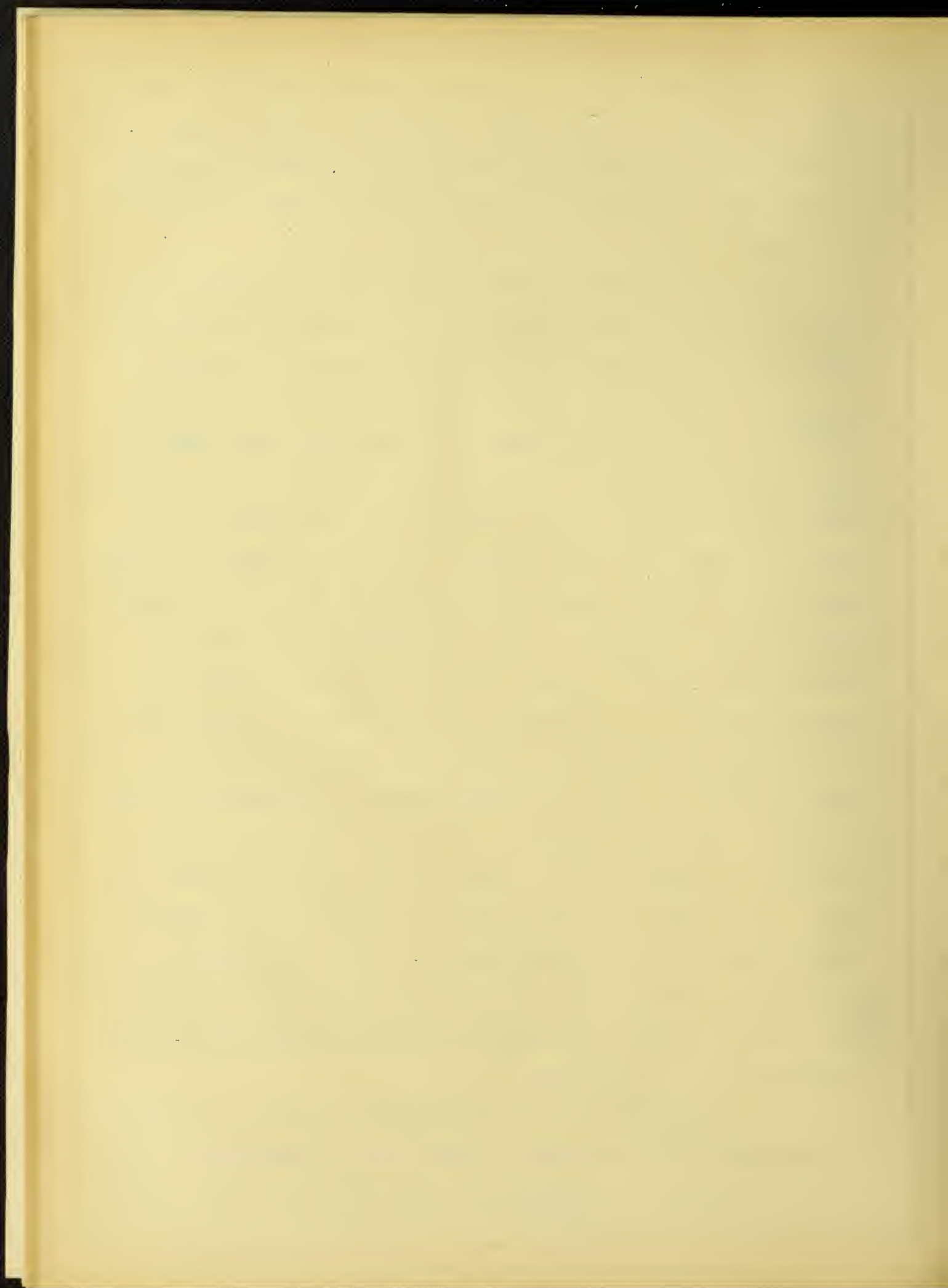
ity are expressed by boys of hoodlum classes in making literal war on boys from a nearby town. Only then is justice done to every one when the sacredness of human life is extended beyond the limits of any prescribed locality to be merged into an universal principle.

In the Out group vengeance exercised by the individual and society with the purpose of purging the community from the criminal's guilt, passed into the blood feud. The law of revenge or-

iginated and had its sanction in religion, but the
Summary.

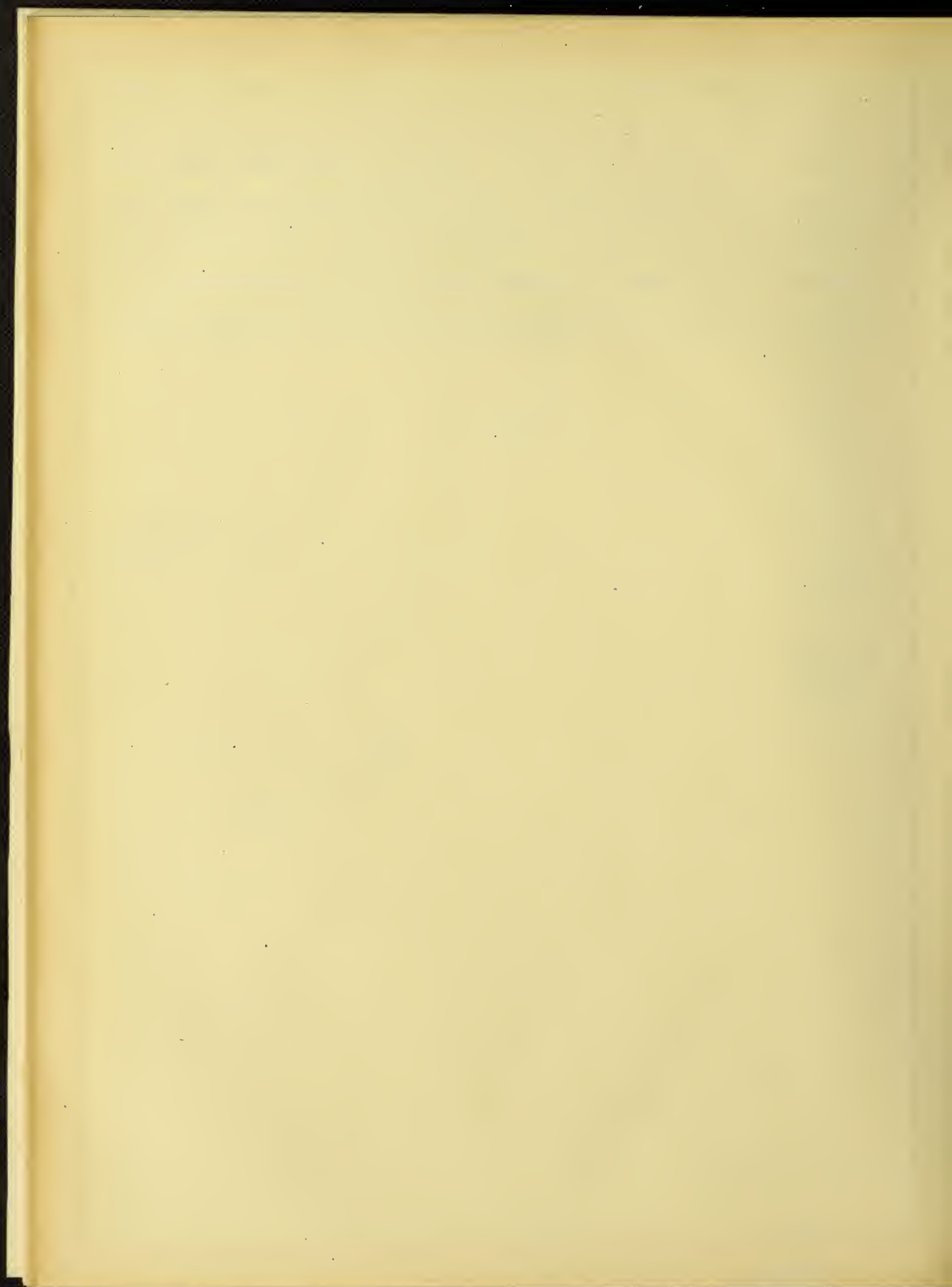
rough sort of justice meted out was on the same low level. The war party had a moral duty forced upon them by the enormous weight of public opinion because the tribal honor was at stake. Retrogression and stagnation in moral and economic conditions was the result. Sometimes revenge took the form of cannibalism which was calculated to give the cannibals the strength of their enemies, and to utterly destroy the latter's souls. The moral effect on the avenging party was sufficient to keep them in the blackness of savagery as long as the practice continued. Sometimes suicide was a form of revenge, which was regarded at first as praiseworthy, then cowardly, and at last prohibitive, which injunction is insufficient to keep men from dieing by their own hand. But in time the blood feud was mitigated by the substitution of some form of regulated duelling for the practice of indiscriminate revenge. The new practice conserved the strength of the tribe, recognized the rights of others and made the criminal responsible for his own acts.

The "in" group passed the sentence of exile on its members if the tribal laws were broken. Since it was responsible for the sins of its members it had to make itself right with God, therein



originating the practice of atoning ceremonies. The rites served to keep alive the sense of divine righteousness but was entirely lacking in distributive justice. However it was hardly necessary to have distributive justice since the cases were very few which demanded the infliction of punishment on its members by the tribe itself. On the basis of prudence and utility the tribe could not afford to exile or put to death the followers of the same totem.

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Chapter 2.

THE PRINCIPLE OF COM- POSITION.

Through the failure to lay punishment to a very great degree on clan members by the clan, the spirit of harmony and co-operation was fostered. Through the feud against the enemies which

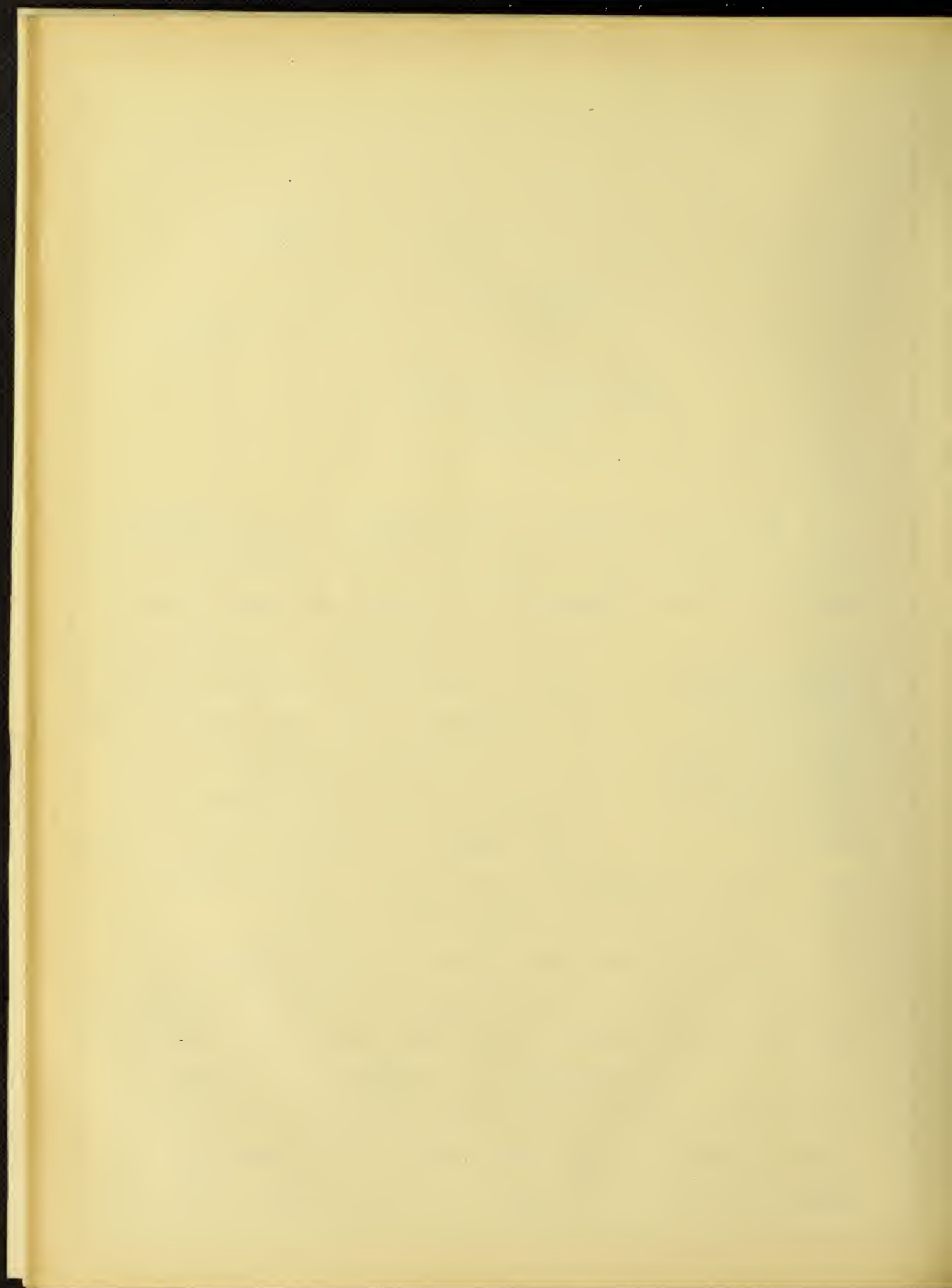
Harmony, sympathy, co-operation and unity developed by relations of tribe to its members and to its enemies are necessities to more rational court procedure.

acted as a socializing institution, the spirit of sympathy was developed and unity strengthened. These were necessary forces in the transition upwards- when crime is measured, considered, arbitrated and fines imposed. Punishment thus will become

more rational, investigations will be made, duties and rights crudely defined, and blood revenge farther limited.

If the blood feud were carried out to the letter no end of trouble followed. One clan avenged an assault on a neighboring clan. The latter returned the deed with interest if it could muster enough forces. Consequently an incessant war The wergeld.

went on intermittently for generation after generation. However in time, a new principle was evolved viz the payment of a fine for an assault on an enemy deemed in the class



of offenses requiring the operation of the law of revenge.

As soon as the new principle took its place among the other customs it was necessary to reorganize society on the basis of the value of each person to the community. Consequently class distinctions were made and were recognized as such for the first

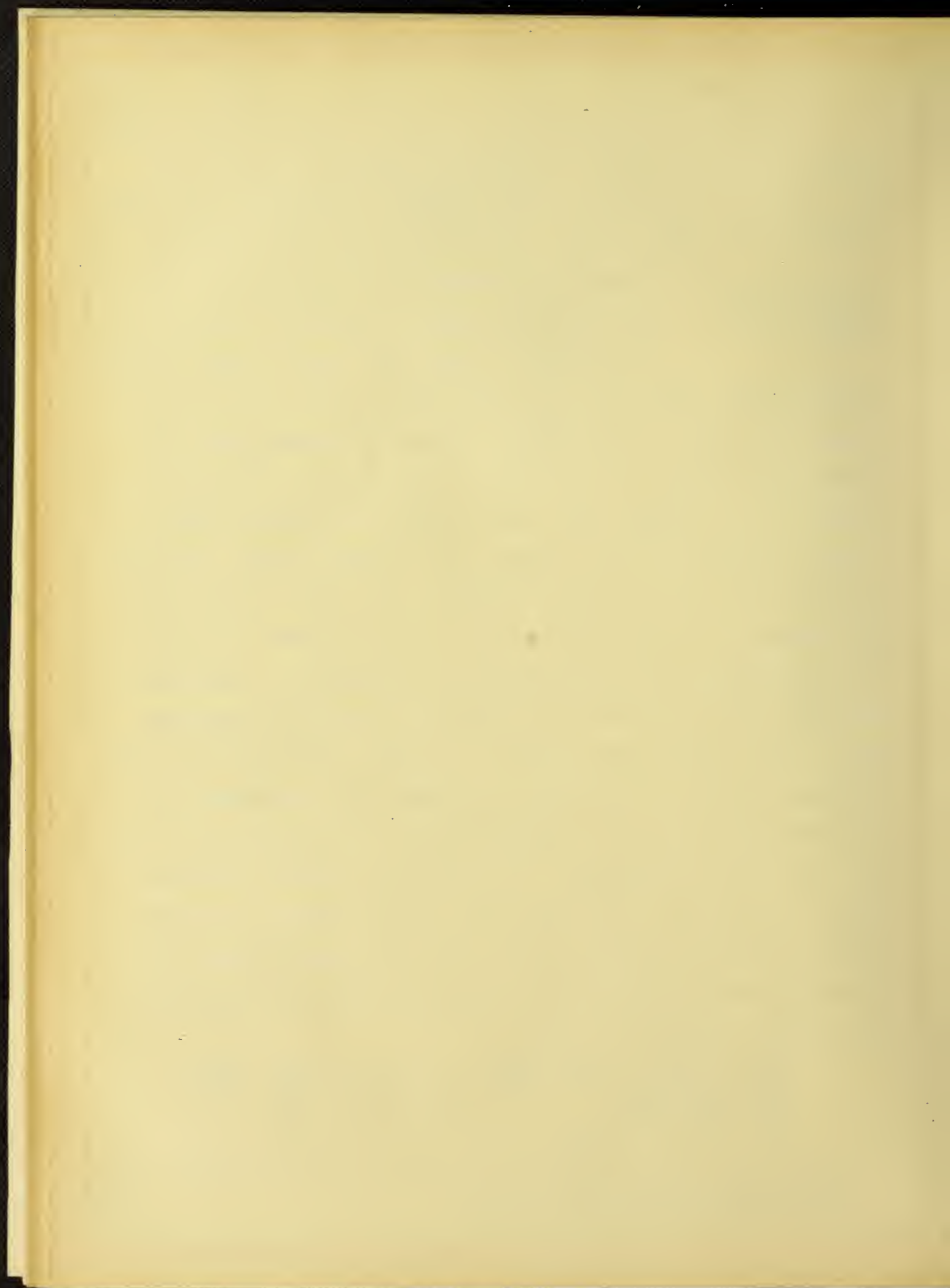
time when the wergeld was levied, e.g. "If a gentleman has caused a poor man to lose his eye or shattered a poor man's limb he shall pay one mina of silver. The slave has no wer, for the same injury the aggressor shall pay half the price. If a man of gentle birth has struck the strength of a man who is high above him, he shall be struck in the assembly with sixty strokes of a cowhide whip. If a man of gentle birth has struck a man of gentle birth like himself, he shall pay one mina of silver. If a poor man has struck the strength of a poor man, he shall pay ten shekels of silver. If a gentleman's servant has struck the strength of a free man, one shall cut off his ear. If a doctor has treated a gentleman for a severe wound with a lancelet of bronze, and has caused that gentleman to die, or has opened an abscess for a gentleman with a bronze lancelet, and has caused the loss of the gentleman's eye, one shall cut off his hand. If a doctor has treated the severe wound of a slave of a poor man with a bronze lancelet, and has caused his death, he shall render slave for slave."¹ From other sources a similar distinction in class is made in the apportionment of the wergeld as follows -

| | |
|-----------------------------------|--|
| Wergeld shows class distinctions. | time when the wergeld was levied, e.g. "If a gentleman has caused a poor man to lose his eye or shattered a poor man's limb he shall pay one mina of silver. The slave has no wer, for the same injury the aggressor shall pay half the price. If a man of gentle birth has struck the strength of a man who is high above him, he shall be struck in the assembly with sixty strokes of a cowhide whip. If a man of gentle birth has struck a man of gentle birth like himself, he shall pay one mina of silver. If a poor man has struck the strength of a poor man, he shall pay ten shekels of silver. If a gentleman's servant has struck the strength of a free man, one shall cut off his ear. If a doctor has treated a gentleman for a severe wound with a lancelet of bronze, and has caused that gentleman to die, or has opened an abscess for a gentleman with a bronze lancelet, and has caused the loss of the gentleman's eye, one shall cut off his hand. If a doctor has treated the severe wound of a slave of a poor man with a bronze lancelet, and has caused his death, he shall render slave for slave." ¹ From other sources a similar distinction in class is made in the apportionment of the wergeld as follows - |
|-----------------------------------|--|

| | | |
|--------------------------------|-----|-------|
| Chief of the Kindred paid----- | 189 | Cows. |
| The uchelior "----- | 126 | " " |
| Man with family "----- | 84 | " " |
| The innate boneddig "----- | 6e | " " |

1. Hammurabi, Sec. 198, ff.

2. The Venedotian Code, Sec. 3, Art. 1.



| | | |
|--------------------------------|-------------|-------|
| The alltud of brehnin paid | -----63 | Cows. |
| The alltud of uchelior " | -----31 1/2 | Cows. |
| The bondman of the island paid | -----4 | " |
| The bondman beyond the sea " | -----6 | " |

The blood money of a woman was half that of her brother. "If a free man strike a bondman let him pay twelve pence. If a bondman strike a free man it is just to cut off his hand or his foot.¹" If a slave shall presume to strike any white person, such a slave for a second offense suffers death."² But it matters not if a white man punish his slave. "If a member of a lower caste injures one of the three higher castes he shall have the offending member cut off,"³ which is the only compensation he has to give. In Morocco a sister, daughter, or son are given in marriage to the offended party⁴ or the offender is bound over to the offended as compensation.⁴

The law of composition could not have been a common law to which all alike had recourse, because it implied the wealth of the compensator, and took wealth for the criminal to satisfy the demand for atonement. In every society there is the class of poor who cannot pay their debts. Hence the fact that composition could not be paid by them is prima facie evidence that the law of revenge was still in force. Even if composition were used it was wholly objective and therefore did not satisfy the revengeful mind. The *Jex Jalionis* was practised and blood feud continued. Even granting that many could and did pay the wergeld, being satisfied with that disposition, another class regarded such a

1. Ancient laws and Institutes, Quoted by Westermarck, 1:518.

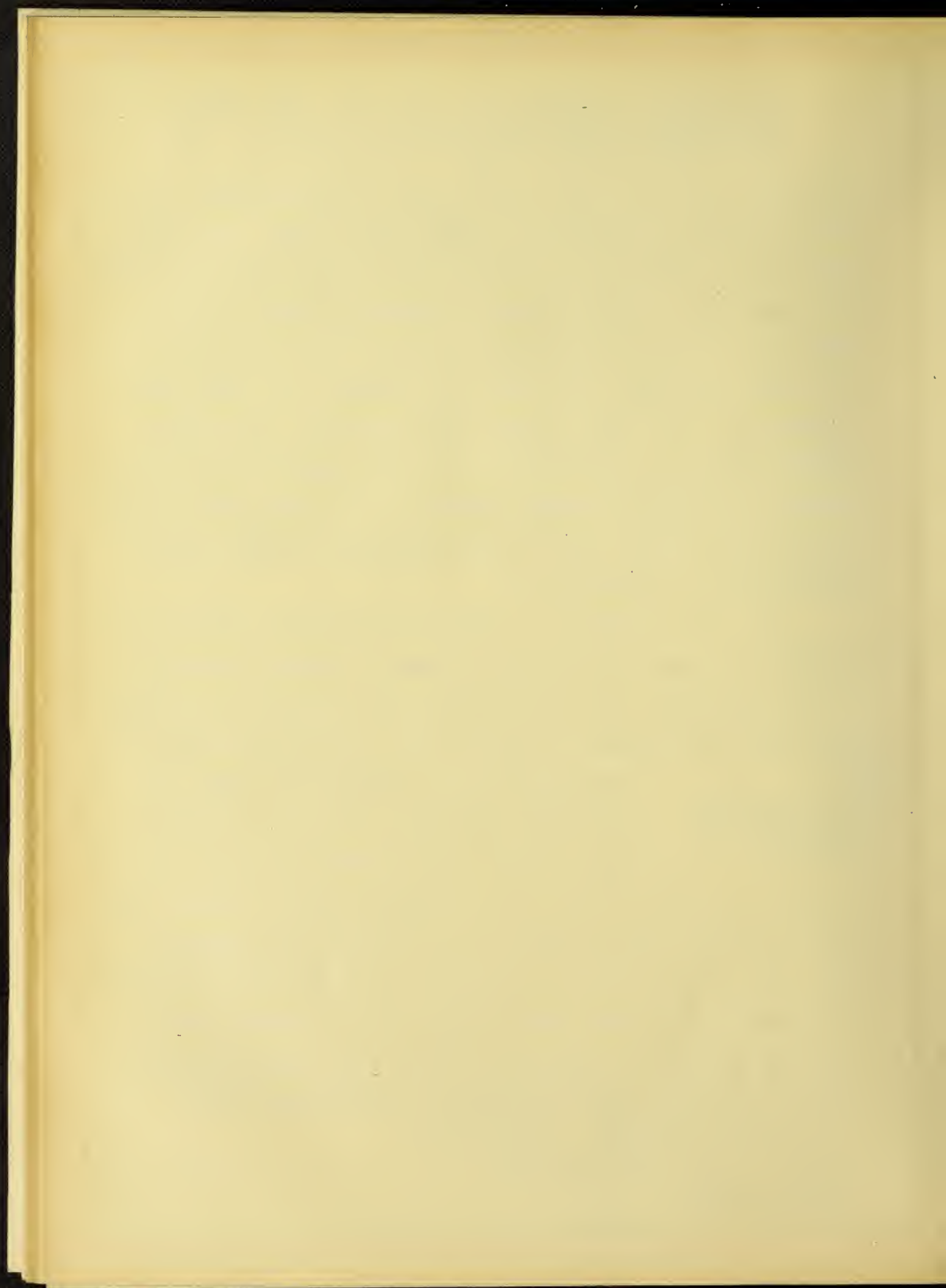
2. Prince, Digest of Laws of Georgia. 78.
Pollock and Maitland. 1:47 and 2:477.

Jenks, Laws and Politics. 102.

Morgan, League of the Iroquois. 331-2.

3. Mann, 8 Sec. 279.

4. Steinway, 1:410. Quoted by Westermarck, 1:484.



means of atonement as cowardly and unfitted for the warrior whose days were passed in the chase and on the field of battle.

"But the pleasure of gain tends to suppress their wounded passion and the loss and humiliation which the adversary suffers by gift exercises a healing influence on their resentment."¹

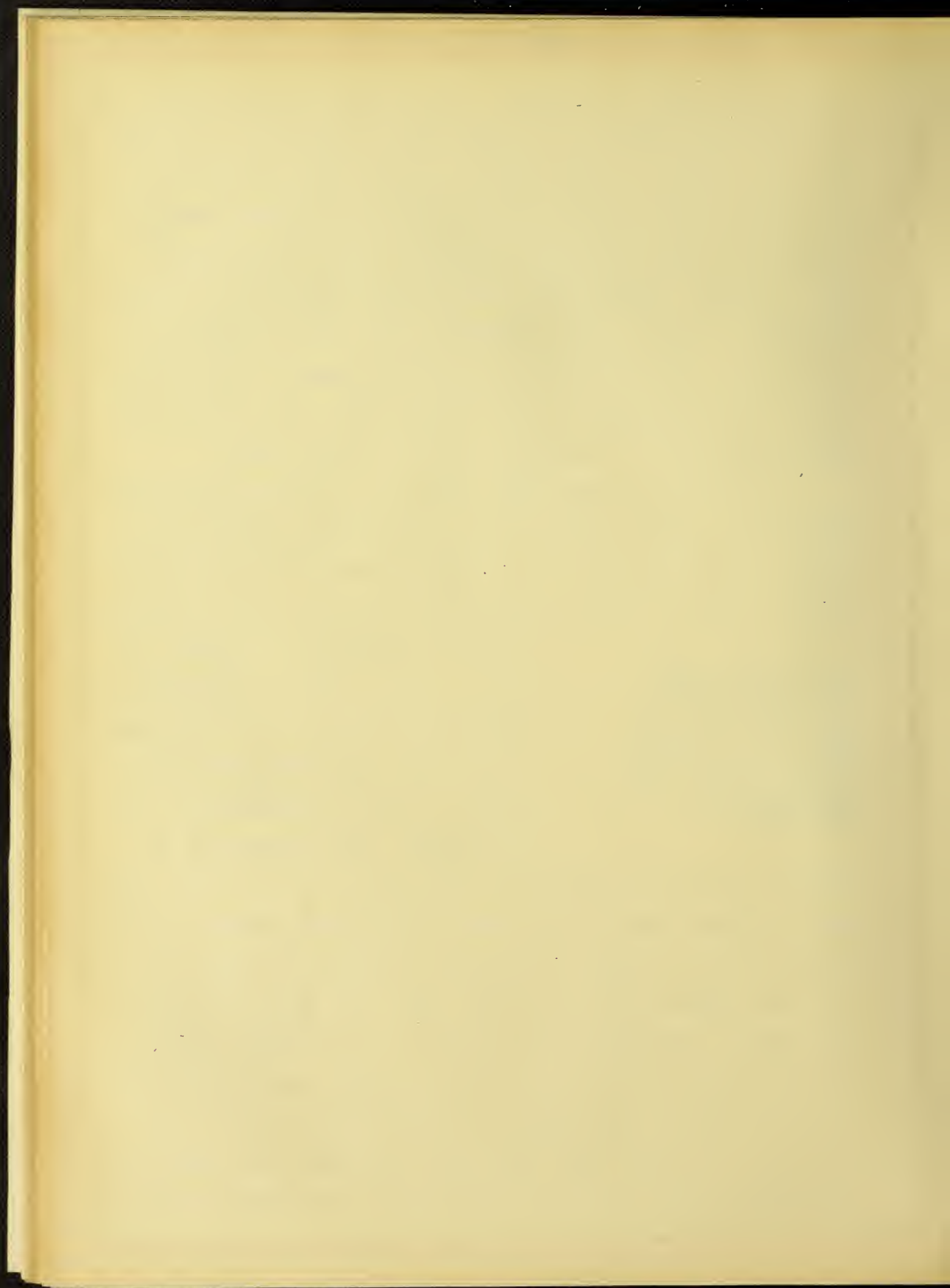
Life, liberty, happiness and property were protected by the enforcement of the new law. Composition was a great principle of conservation. The followers of and the believers in the enforcement of that law might well be classed as the conservative party in distinction to the liberal part of blood revenge.

The laws of revenge and composition do not apply and are not enforced when an enemy ravages and destroys a neighboring tribe. Two tribes may live practically side by side, the one allowing a third to utterly annihilate the other, without enacting

Revenge and composition are enforced by a body which is responsible for the acts of its members. Laws of revenge and composition are not applicable to a third party.

revenge or demanding the payment of money. If one tribe did interfere it thereby accepted all the consequences of the blood feud which were direful enough to make it attend only to its own business. The business of enforcing

the law is a matter for the tribe to take care of. Feud exists between tribes of the totem and non-totem groups. The totem may consist of several tribes all of which are drawn into the feud engaged in by one of the tribes. The tribe or tribes are directly responsible for the acts of its members. Responsibility is collective and no one can escape. Innocent and guilty suffer alike so that the lex talionis becomes man for man and woman for woman. "The first great principle with regard to punishment is that all of the relations of the culprit in the



event of his not being found, are implicated in his guilt. If, therefore the principal cannot be caught, his brother or father will answer nearly as well, and failing in those any other male or female relative who may fall into the hands of the avenging party".¹

"Among the Fuegians, etiquette and custom require that all relatives of the murdered person should visit their displeasure upon every connection of the manslayer, each personally.² The avengers of blood are not satisfied to have the offender delivered up or kill him,"but would yet exact from all the murderer's friends, tribute or infliction with sticks or stones."² Revenge by the Greenlanders"costs the executioner himself, his

Examples of
class re-
sponsibility.

children, cousins or other relatives their lives, or if they are inaccessible some other acquaintance in the neighborhood."³ "And be-

hold the whole family is risen against thine handmaid, and they said deliver him that smote his brother, that we may kill him for the life of his brother whom he slew."⁴ The lex talionis is well illustrated in the laws of Hammurabi too:-"If a builder has built a house for a man and has not made strong his work, and the house he built has fallen, and thus caused the death of the owner of the house, that builder shall be put to death."⁵ "If he has caused the son of the owner of the house to die, one shall put to death the son of that builder."⁵

With the idea of collective responsibility goes the establishment of the cities of refuge:-"And if a man lie not in

1.Gray, Journal of Expedition and Discovery,Quoted by Wes.1:35.

2.Bridge,South America,5:13+27.Quoted by Westermarck,31.

3.Cranz,History of Greenland,1:78.

4.2nd Samuel,14:7.

5.Hammurabi,Sec. 229ff.



wait but God deliver him into his hand; then I will appoint thee a place whither he shall flee. And if a man come presumptuously on his neighbor to slay him with guile, thou shalt take him from mine altar that he may die."¹ And this is the case of the manslayer who shall flee hither and live:" who so killeth his neighbor unawares and hated him not in time past, as when a man goeth into the forest with his neighbor to hew wood and his hand fetcheth a stroke with the axe to cut down the tree and the head slippeth from the helve, and lighteth upon his neighbor that he die; he shall flee unto one of these cities and live; lest the avenger of blood pursue the manslayer while his heart is hot and overtake him because the way is long, and smite him mortally whereas he was not worthy of death as he hated him not in time past."² Or "if he smote him with an instrument of iron so that he died he is a manslayer, the manslayer shall be put to death, and if he smote him with a stone in the hand whereby he died, he is a manslayer----or if he smote him with a weapon of wood he is a manslayer. The avenger of blood shall himself put the man to death."³ Therefore these six cities of refuge shall

be established, viz"³ Others than the Hebrews had similar cities:-The Arunta tribe of Australia have a sacred spot near the camp in which plants, animals, and men are safe from punishment.⁴ The people of Upolu district in the Samoan Islands had an old tree in which their god resided. If the victim reached that place before the pursuer he was safe from revenge and was given a fair trial.⁵ The people of Hawaii

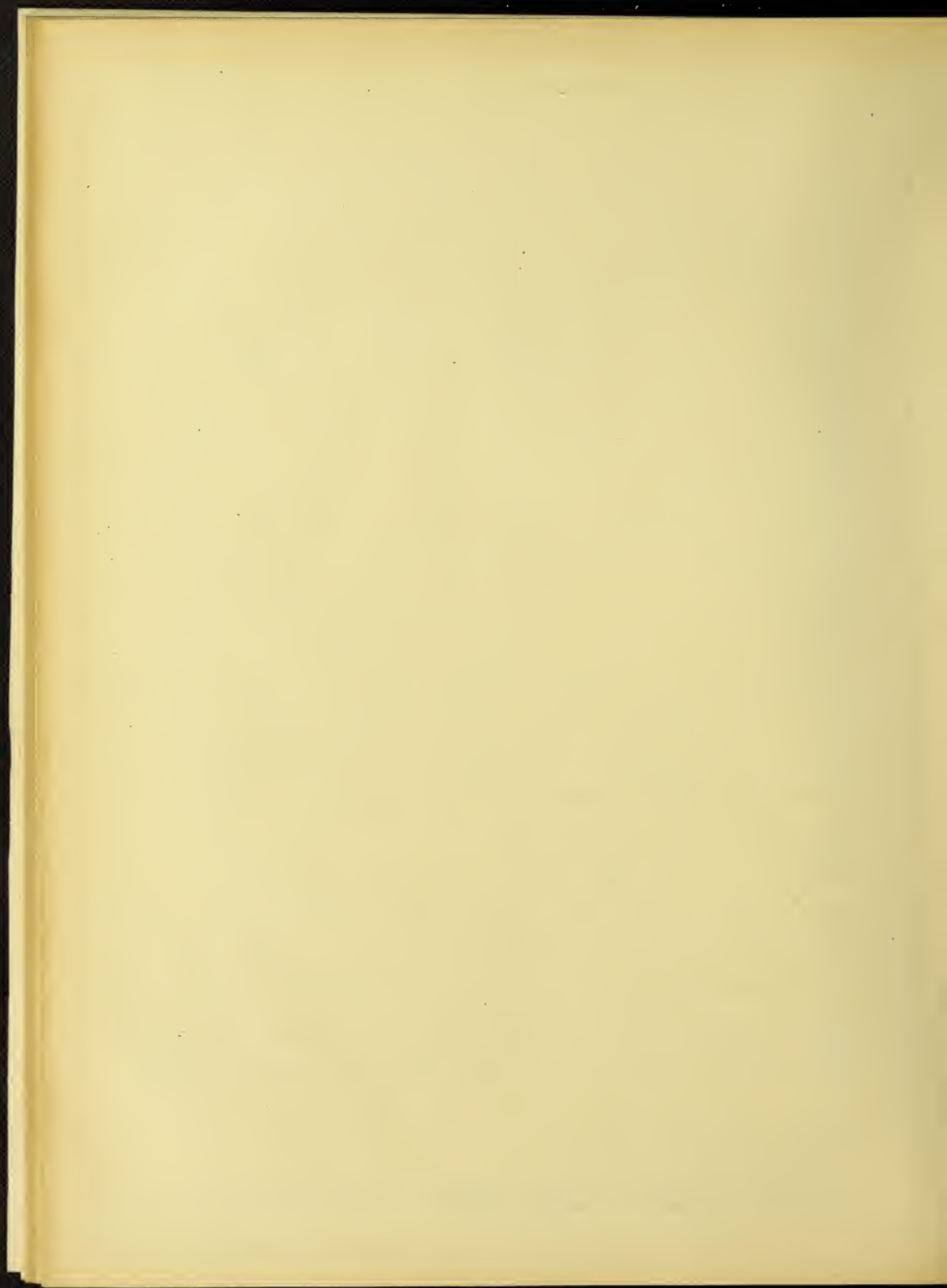
1. Exodus, 21:13-14.

2. Deut. 19:4-6. 4:41ff.

3. Num. 35:15, 20, 21.

4. Spencer and Gillen, Native tribes of Australia. 133.

5. Turner, Samoa, 64. *****



had two cities of refuge in each district which protected the vilest criminal. If the avenger followed the victim inside the gate he was put to death for outraging the sacred precincts of the gods. The pursued returned thanks before the hallowed altar to the protecting idol god, and stayed in the divine shrine three days, after which he was forever under the protection of the divine hand.¹ The American Indians had similar asylums² for criminals who were safe from harm in that abode. The great city of refuge in Calabar, Congo, was at Oman. "Thither mothers of twins, widows, thieves, and slaves fly and if they reach it they are safe."¹ Even in the middle ages in Europe the church was the one great sanctuary and harbor for the oppressed, who always sought its open doors. The forcing of such an one from the holy institution was regarded as a crime against the people of righteousness, the Bible and God himself.⁴

As composition was one principle of conservation in respect to the blood feud, the protection afforded by the cities of refuge was another. When primitive society took the last step

Morality involved in the establishment and protection of the cities of refuge.

it advanced in civilization, though the progress to them was unconscious. In the first place when the cities were established,

there was a confusion of intentional and

unintentional acts and no line of demarcation between an accident and a purpose. For in Deut. 19:4-6 we read that the ax which slips

from the handle, accidentally killing the working companion gives rise to a law

(a) Confusion of intentional and unintentional acts.

which says that the man in whose hands the

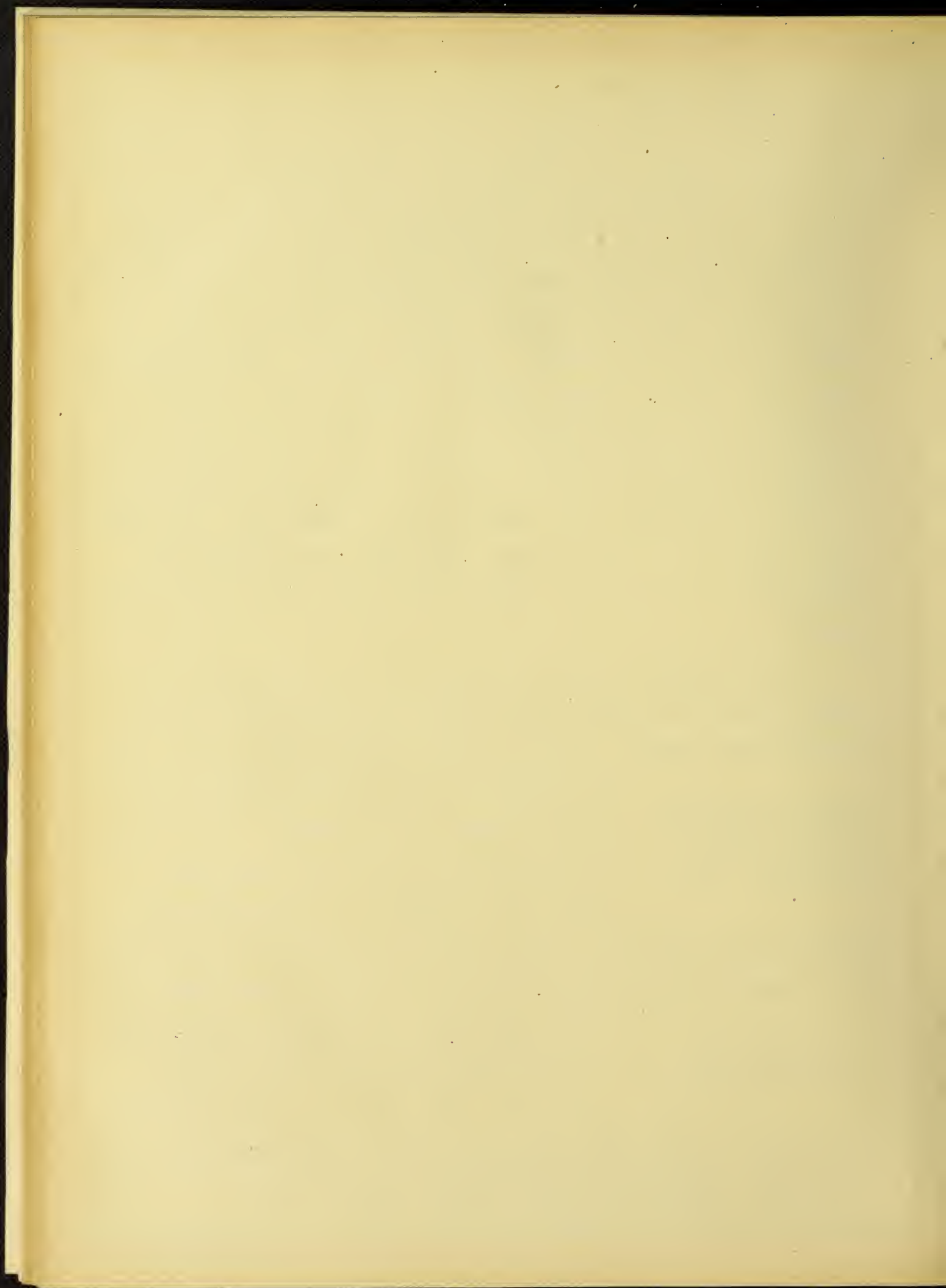
ax was will be protected inside the walls of the sanctuary; but

1. Turnbull, Voyage Around the World.

2. Bancroft, Native Races of the Pacific States. 3:167.

3. Kingsley, Travels in Western Africa. 466.

4. Maitland, His. of the Eng. Law before the Time of Edward 1st, 2:590.



in the very next example, Num. 35:15ff, we find that, "if he smote him with an instrument of iron he is a manslayer." In the second

(b) Cities of refuge give time for passion to cool. place sufficient time elapses before the avenger overtakes the avenged and at most reaches the limit of pursuit, so that the heat of angry

passion has had time to cool down. In the third place the harbors were a means of divine protection. An offense committed therein

(c) Cities of refuge gave divine protection. would be an act of insult to God himself. Since God is the mighty avenger, all powerful, slow to anger, and plenteous in wrath the punishment

would be turned against the would be punisher paid with the interest of his own life. Having received divine protection the suppliant was never harmed when he returned to live among the relatives of the person whom he killed. Finally the suppliant at the altar was given a trial before the elders and chief men of the tribe. In this way the right of the plaintiff and the defendant were adjusted in a rational manner, instead of appealing to the help of relatives or paying for an act the justice of which was unknown.

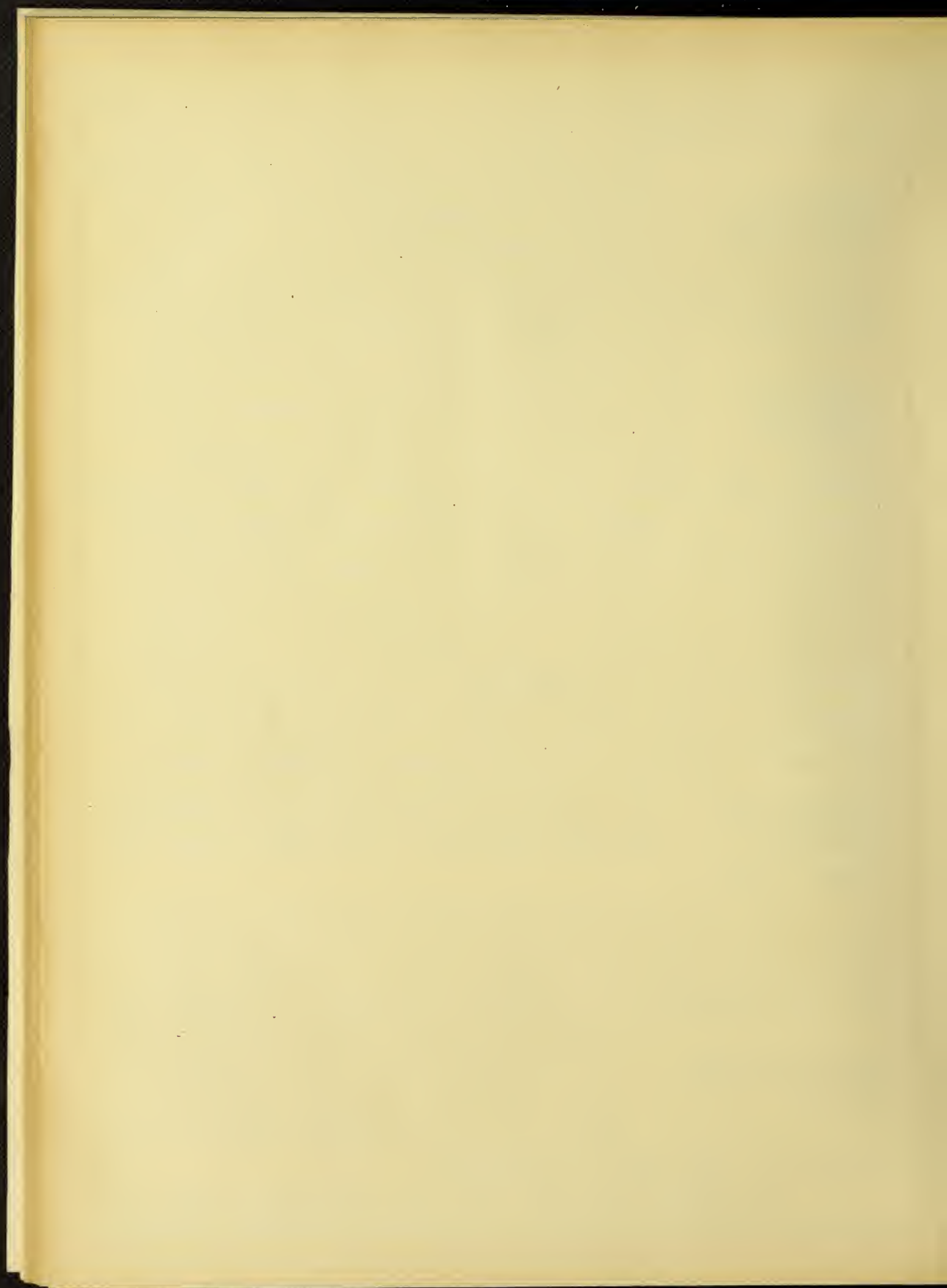
(d) Trial given suppliant. The method thus established begins to approach the hazy recognition of the rights of the individual as such.

The courts thus established did not exist for nice questions of law. They did not argue the case for an appeal or get the suit dismissed on a technicality. But they did recognize that

court determines how case is to be settled. a feud existed, and, without asking the merits or demerits of the case, hauled the lit-

igants in to settle on some method by which justice in a crude way was established.

The oath and the ordeal were thus recognized as means of detecting innocence and guilt, if the court were not able to settle



the case and it generally was not, the matter was referred by Oath and Ordeal oath to the decision of the gods. The forms as means.

of ordeal employed were many and varied, depending largely upon the ingenuity of the officials.

When the courts were recognized it was therefore necessary that an evolution in the idea of God should take place. He was no longer the divine avenger roaming about the milky way, rewarding the good and punishing the wicked. But he became the barbarians' divine judge who knew how to settle disputes and wrongs justly. Consequently the oath by appealing to the all-powerful judge of Heaven and Earth gained its efficacy. To all people it was an extremely delicate matter, involving the loss of friends, life, and property besides all conceivable bodily affliction and misfortune, if it were taken in confirmation of a lie.

However the oath was too sacred and had behind it too much power to be handled lightly in the court. The court unknowingly and unwillingly might abuse the prerogative reason for ordeal. of the King of Heaven but nevertheless misfortune would follow their footsteps. Moreover the court needed to know

(a) Oath too sacred and dangerous to handle lightly. the outcome of the trial.-A man may have been bold enough to risk the thunderbolts of Jove by swearing falsely in which case

he might not have received immediate punishment-in order to satisfy the growing sense of justice in so far as to determine the innocent and

(b) Immediate sentence demanded.

guilty. Therefore some more effective method must be employed.¹

The method found was the ordeal combined with the oath.

1. Westermarck, Evolution of Moral Ideas. 1:506.

The ordeal had its origin, among savages, in the wizard.

He was forced by calls made upon him to invent new systems which

Ordeal originated
in magic religious
principles.

would be just, or proving fatal to the suspected, would place his ingenuity and verdict beyond challenge¹ Among the most

advanced civilizations of Europe during the Dark Ages, the ordeal had its origin in the same magic religious principle though there were no wizards in their social organization.

The magicians of the East African Wakanda, when a supposed criminal is subjected to the ordeal, require him to say:—"If I have stolen property of so and so, or committed this crime, let the Mulunga respond for me; but if I have not stolen or done this wickedness may he save me."² The magician slips a hot iron over the palm of the suspected person's hand four times; if he is not burned the ordeal says he is innocent. The African Masia for steal-

Examples of
ordeals.

ing cattle drinks a mixture of blood and milk. If he is not dead from it in fourteen days, he is innocent.³ The negroes of North Guinea have the

ordeal of red water. Before drinking the concoction the name of their god is invoked three times. If the suspected person vomited after the drink he was innocent.⁴ The trial of jealousy in the old testament involved a curse sent on the woman who was accused of adultery. If she were guilty she asked that her belly would swell and her thighs would rot.⁵ In European countries the ordeal by water was the most common. If a guilty person were thrown in the sea or river, the sacred water refused to unite with him and the person floated. He was removed and executed. If the person were innocent the holy element clasped him to the bosom of God. In either case the ordeal was fatal since the guilty were hanged and the innocent drowned. (For footnotes see p 31.)



Less common among our forefathers were the ordeals of boiling water, red hot irons, fire, casting lots, bleeding, eucharist, cross, and poison.

The great function of the ordeal was as Maine says , "to give hot blood time to cool, and to prevent men from redressing their wrongs" themselves. In the court which took up the wrongs of the tribe, the customs of the past were recited by the elders. If

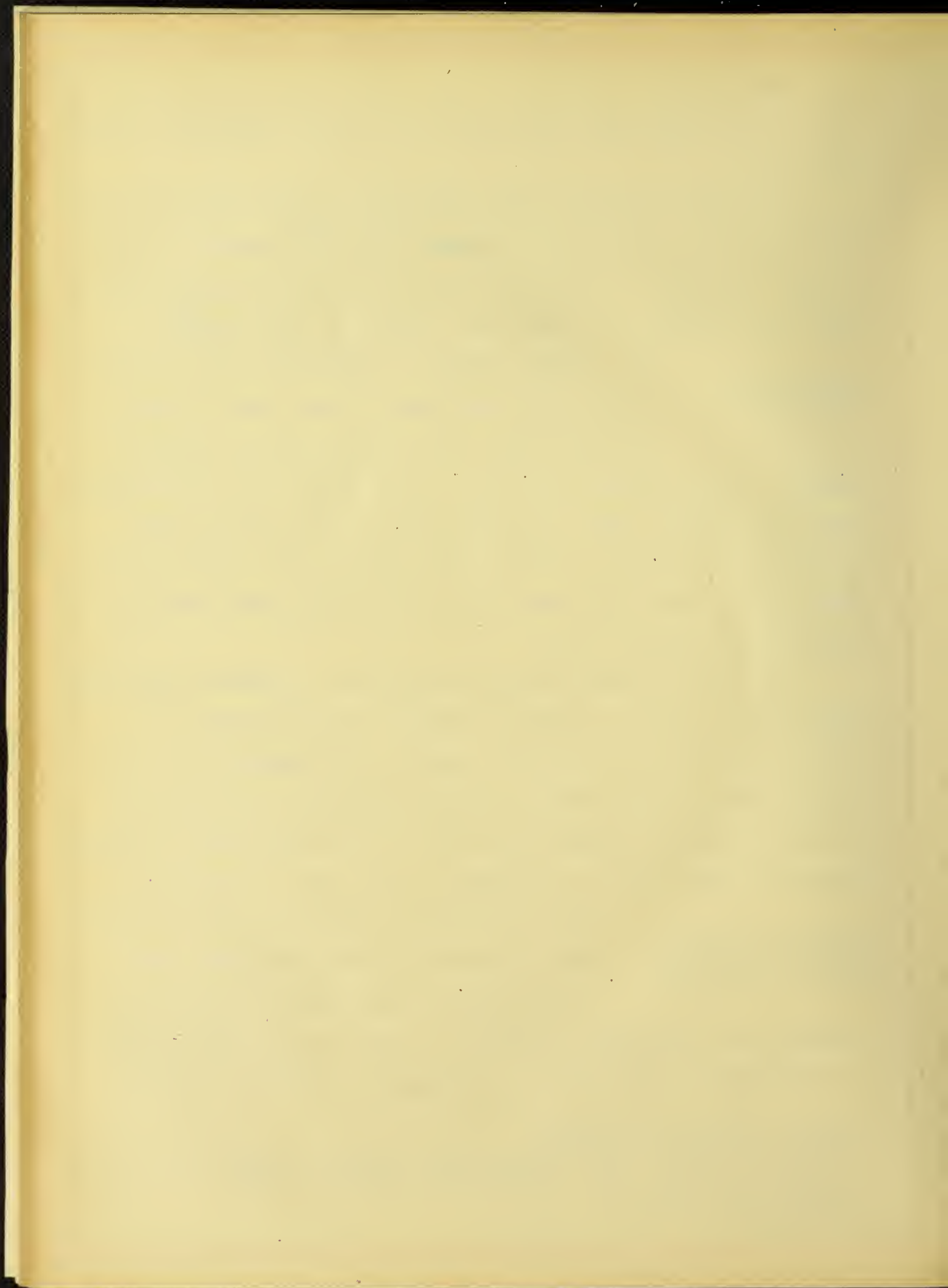
Function of
the ordeal.

the accused refused to accept the means of settlement thus laid down, he was almost forced outside of the family group by moral disapprobation. To feel the warm heartbeat of his father, of his brothers, and of his kinsmen, when the sombre gloom of dark settled down on the vast stretches of forest before the hut, was sufficient in every case to make the accused accept the ordeal rather than be cast into the hostile forest.

As we have shown the oath, falsely taken, endangered the fortunes of the contending persons in life or consigned them to a restless existence in the land of shades. By combining the oath with the ordeal, the immediate outcome of lying to God followed but not in a direct judgment from him as the suing people thought. However the same effect was produced on the mind of the guilty.

The knight who was guilty but had taken an oath to uphold the honor of woman, had a nervous hand in directing the spear, and a weakened arm in wielding the battle ax from his own consciousness of the wrongs he had committed. Consequently when ^{he} was unsaddled

1. Farrar, Primitive Customs.
2. Krapfs, Travels in East Africa, 173. Quoted by Westermarck, 2:687.
3. Merker, Die Masia. 211. Quoted by Westermarck. 2:687.
4. Merker, Die Masia, 211 " " " " "
5. Num. 5:20 ff.



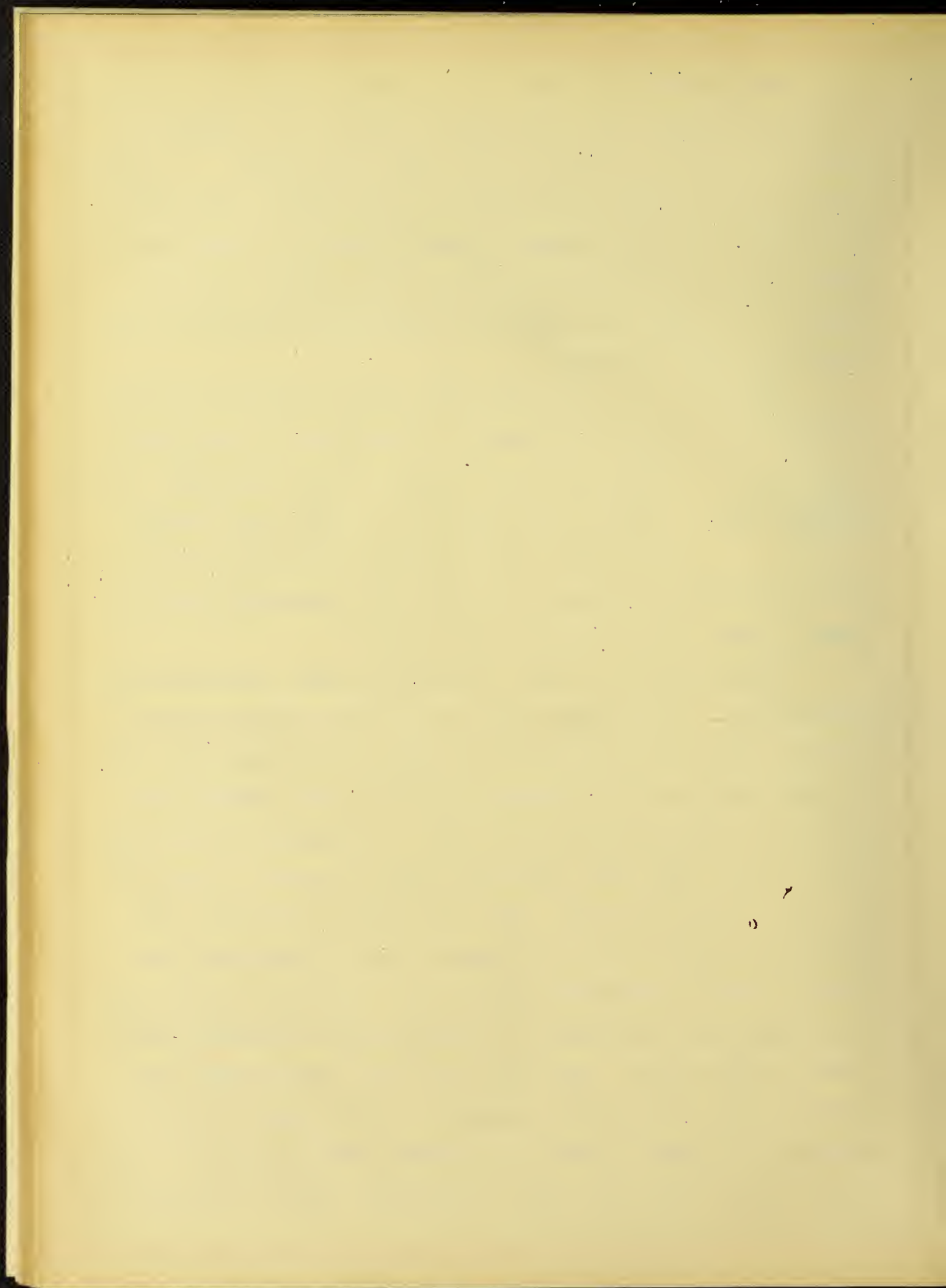
and trampled beneath the feet of the righteous conqueror's horse the judges declared the fallen guilty because of the judgment of God sent on him in violation of the oath falsely taken. A similar illustration is found in the ordeal of the eucharist. The criminal was unable to eat the sacrament without choking, for his sense of guilt became so powerful in thinking of the outcome, that the nerves in his throat were paralyzed and refused therefore to perform their proper function.

Therefore the ordeal was a more rational system of punishment than the processes of revenge. It was about as effective as

Ordeal more many present day systems of court procedure. Records of those cases tell us that the criminal
rational than revenge.

was usually found. Moreover the system did the work of deterring relatives and kinsmen from committing like offenses because of the fear of consequences.

Another method of court procedure was that connected with compurgators. — Men brought along by the acusser and the accused to swear that they believed the one right in his accusations and the other innocent of the charge laid at his door. However the practice of compurgation did not square in practice with the definition of the term. That system was hardly intended to show who was right and who was wrong. But the kinsmen oath-helpers did show who in the tribe were willing and ready to fight for the plaintiff and the defendant respectively. From the first all the oath-helpers were men capable of bearing arms, and wearing their swords at their sides. The feeble, the old, and the women and children never acted in this capacity. If the object had been to discover the truth, the word of the women would have been as valuable as that of the men, and in some cases, more so. "When the



chastity of the queen of France was challenged, and on it depended the right of her infant son to succeed to the throne, she brought

not domestic witnesses to prove the blameless-
Compurgation.

ness of her life, but three hundred nobles with swords by their sides, to swear to their belief in her purity, in other words to fight for her if the need arose."¹

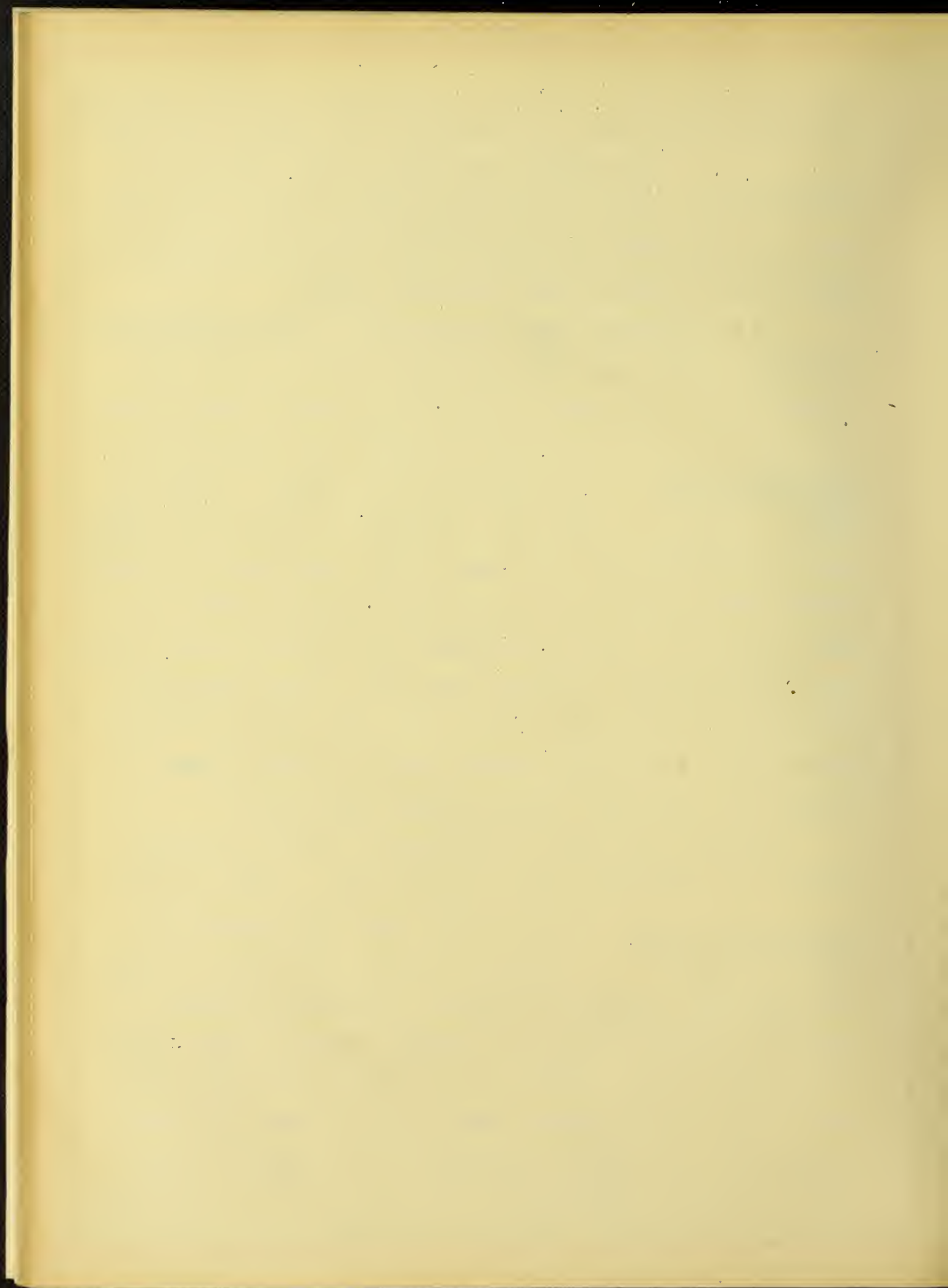
These compurgators were not witnesses. They did not come to testify to what they knew or had seen relative to the trial in question, but they came to support the claims of their kinsmen

The object of compurgation the suppression of blood feud. in a wholly different way. The system was not intended to give justice. It was established on the basis of and for the purpose of suppressing the blood feud. If one side had two or three hundred armed men with shining armor and sharpened swords, to the other sides' fifty with poor equipment, the weakness of the latter was thereby disclosed and might made right. It were infinitely better for the weaker side to see at the trial that it was the weaker party, and thereby end the question; than to plunge blindly into a prolonged and destructive blood feud..

Primarily the object of compurgation was not to secure justice, but inevitably some virtues followed. A base villainous criminal would find scarcely any friends to support him, and as a result would be at the mercy of the innocent and wronged tribesman.

Compurgation a guarantee to conduct. Therefore it must have been to a certain extent at least a guarantee to such an ones conduct, if his friends were ready and willing to fight for his cause. Since the law of the social body unconsciously reflected the sentiments of its members a higher

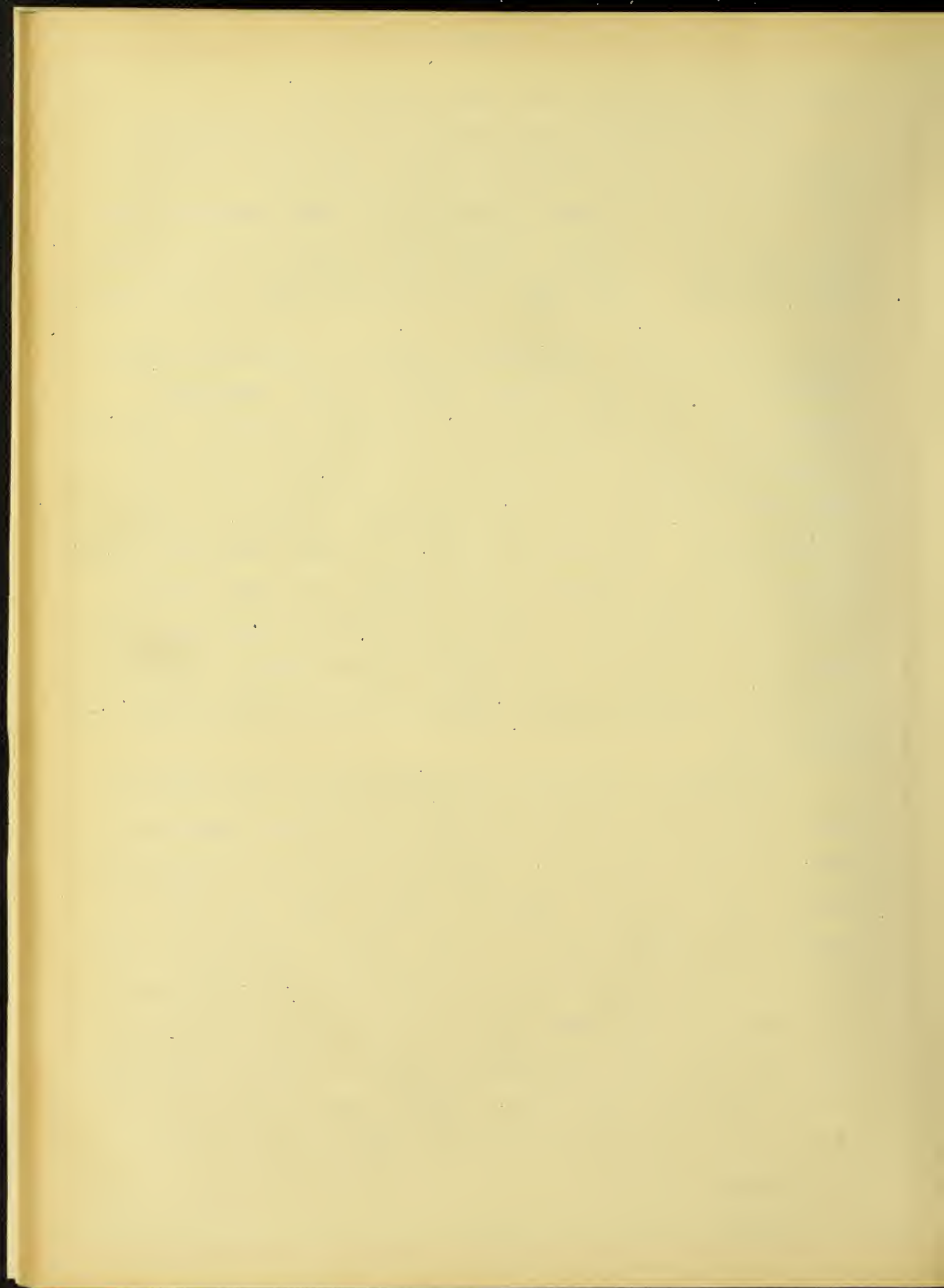
1. Law of the Ripuarians. Quoted by Sutherland, Or. of the Mor. In. 2: 187.



morality was consequently ~~was~~ rising among them.

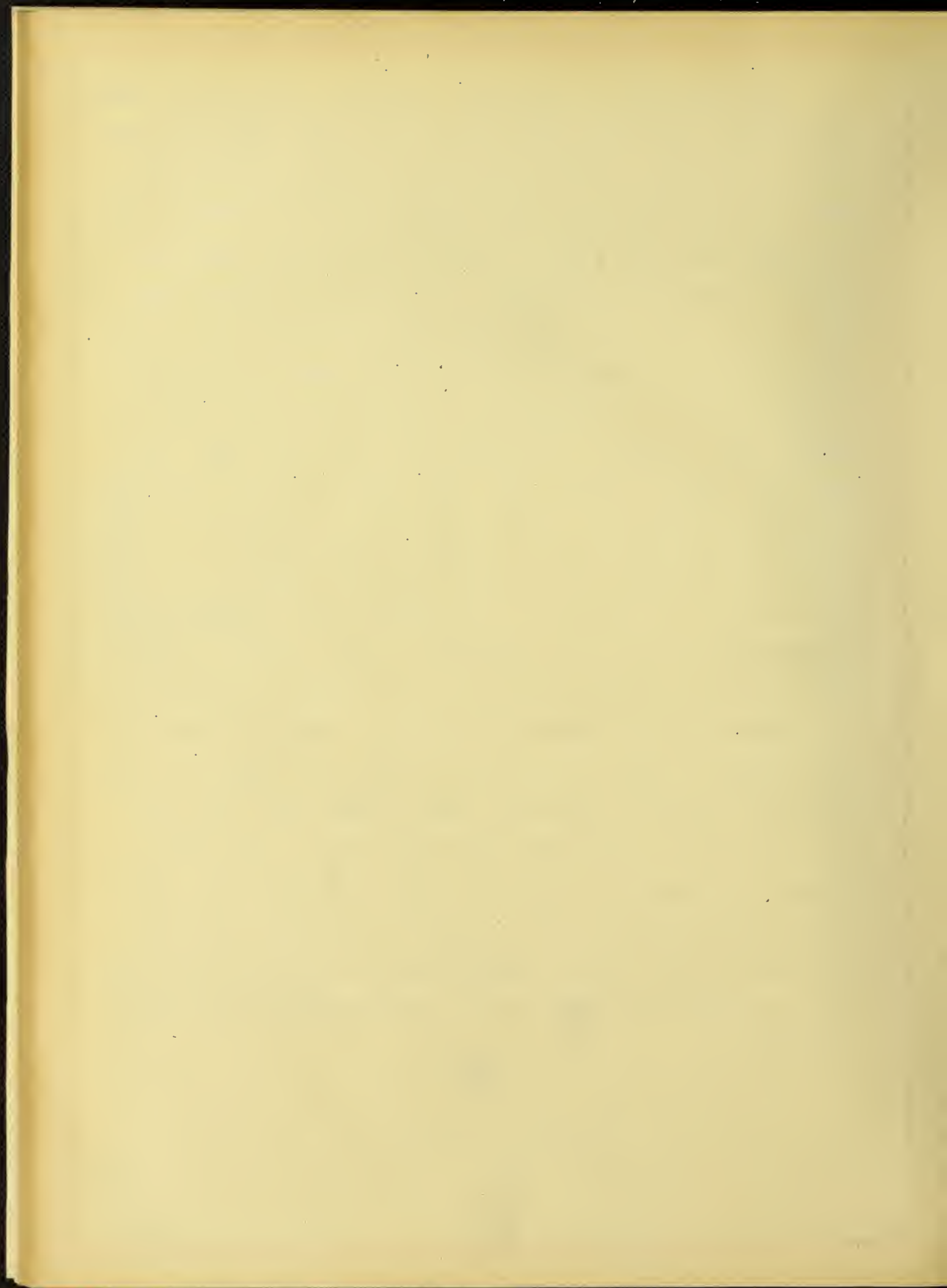
Even compurgation itself ceased to be the old method of arranging men of one tribe against those of another in order to fight the issue to a close at sword points. The accuser and the accused brought their supporters into court. Fines took the place of blood. with them. We can see how easy it would have been for the one with oath-helpers superior in number and fighting ability to the other to have started a riot. Remarkable though it may seem both sides were law-abiding citizens. This was the machinery of trial and the men were to carry it out. The Judge passed the verdict in accordance with the greatest number of compurgators. The guilty, because the largest number believed he was, however was released on the payment of a fine. Though the armed men were there the fine was paid and no resistance made. This then is an index of the bringing to consciousness a peaceable settlement of disputes, hence morality is being socialized and individualized.

Vengeance at its lowest was undirected and therefore non moral. Retaliation in kind and degree, son for son, father for father- followed. The guilty was unascertainable and responsibility fell where it would. Hence the criminal went free while some one else suffered for him. Blood revenge was irrational for many more lives were required in atonement than the offense merited. The notion that a man had been killed and got what he deserved came only with the modern conception of justice. The steps in the conception of that justice and the moral states involved, covering ages in the life history of the race can be discussed only in meager form.



The principle of composition replacing retaliation saved the economic conditions, and preserved the best energies and life blood of the tribe. In order to tell the basis of levying wer-geld, the rich, middle, and poor classes had to be divided. Common bonds united the members of each division until class responsibility was fully developed. The cities of refuge established were a direct and wholesome expression of the united kin. Though there was a confusion as to just who might be protected in them, nevertheless they gave the pursued protection from the pursuer until the heat of anger had had time to die down and a fair trial could be established. The method of court procedure was based on-(1)The oath, which called God for a witness of innocence; (2)the ordeal combined with the oath which was more definite and more satisfactory to the growing sense of morality;and (3)compurgation which was a guarantee to mens' conduct in private life resulted in bringing morality to the focus of consciousness.

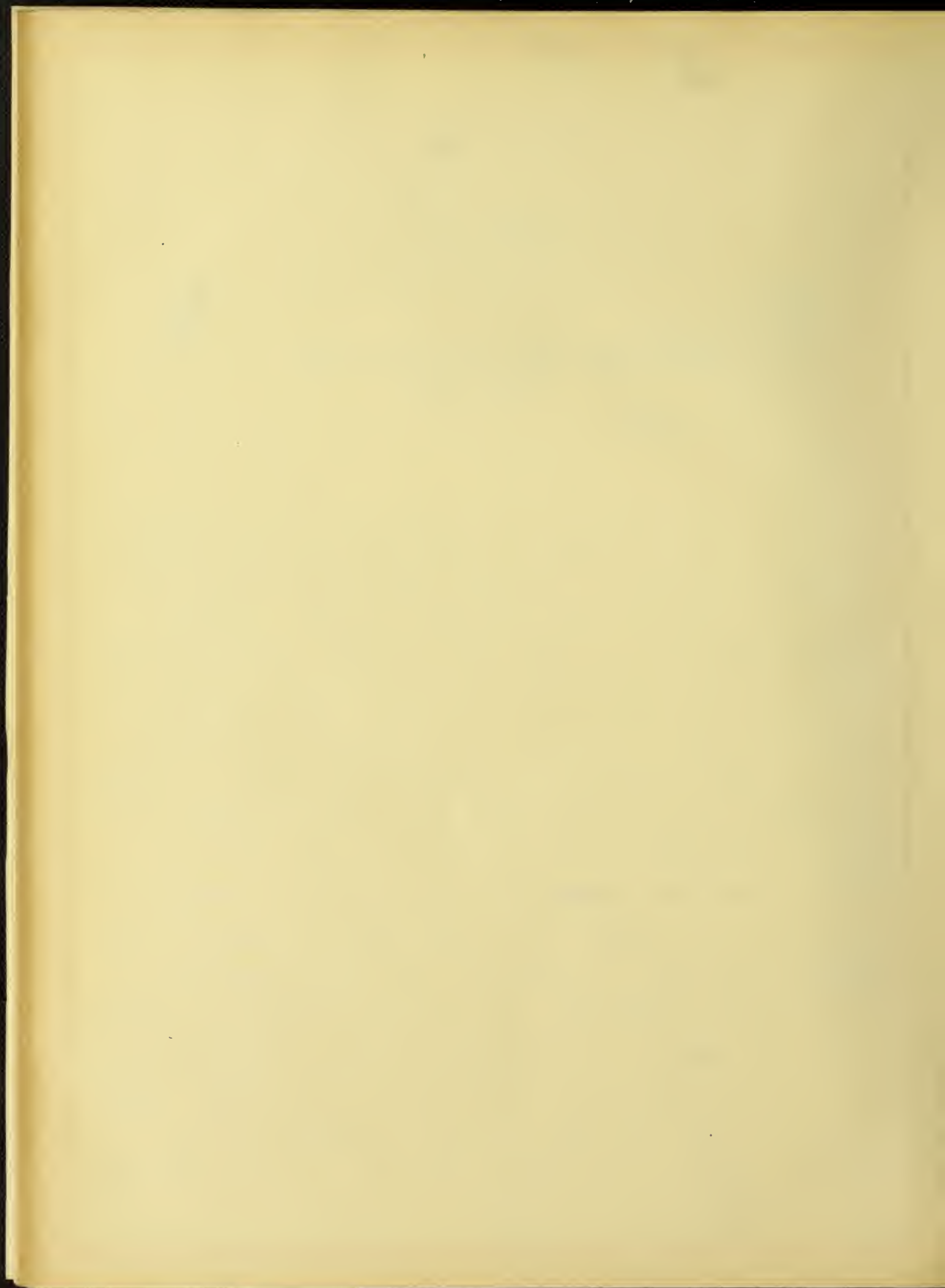
Throughout the processes of revenge, composition and the establishment of rude courts from the cities of refuge, the tribe was supreme. What one member did they all did. What the tribe loved and hated the individual loved and hated. As the totem founder was supposed to have done so the descendants did. The actions and traditions of the son were bound by the traditions and customs of the father. Little chance was there for the freedom of individual interplay in the "hide-bound" custom of tribal solidarity.



Chapter 3.

RISE OF THE POLITICAL UNIT OR RISE OF THE STATE.

The breaking up of the family lead to the abolition of tribal solidarity. No longer did the young man content himself to be tied to the "apron strings" of custom. Economic necessity demanded that he go to new countries to better his condition. If there were no new places known he had a powerful incentive in hunger to find them. Other enterprising red-blooded fellows decided to make the new countries their homes. If father and mother would not go they could stay at home. But there must be some leader, some one who could take the place of the old tribe in maintaining respect and law. Accordingly a new group of men was formed about a common leader usually a powerful tribal chief through wealth or personality. This group in Saxon time took the name of *commitatus*. The men bound themselves to obey and respect the leader in settling the new country. He in turn for their fighting ability gave them protection and individual rights in the new land. The king to maintain his dignity must maintain his respect in the territory given away. Rioting, drinking, and fighting were to be unallowable which prohibition took in



after years the title of "the king's peace". The support of the king's peace^{grew} until a recognition of a central authority developed in the state.

The state thus established "is an ethical society wherein the instinct of revenge is moralized; that is, removed from the domain of impulse to the domain of reason, elevated from the particular to the universal. It thus becomes, as retributive justice, an expression of the ethical might of the organization, an attribute of right, and the bulwark of freedom".¹ Until society has formed an universal organ as a state, there is no criterion by which, or certainty that justice shall be administered.

Justice is not a wrong done to the criminal. It is a right to him to redress his wrong, - a right due him as a person. The reason which he has broken is reapplied to him

Definition of justice. as punishment. — "Such suffering as is inflicted on him in a definite way, or in the name of the society of which he is a permanent or temporary member."² The moral law rules the good by their acquiescence, the criminal by the endurance of its penalties. "Punishment is the right of the wrongdoer."³ It is the application of justice to him and as Augustin~~us~~ says, "The justice of the unjust."³ His transgression has made a debt which justice requires shall be paid.

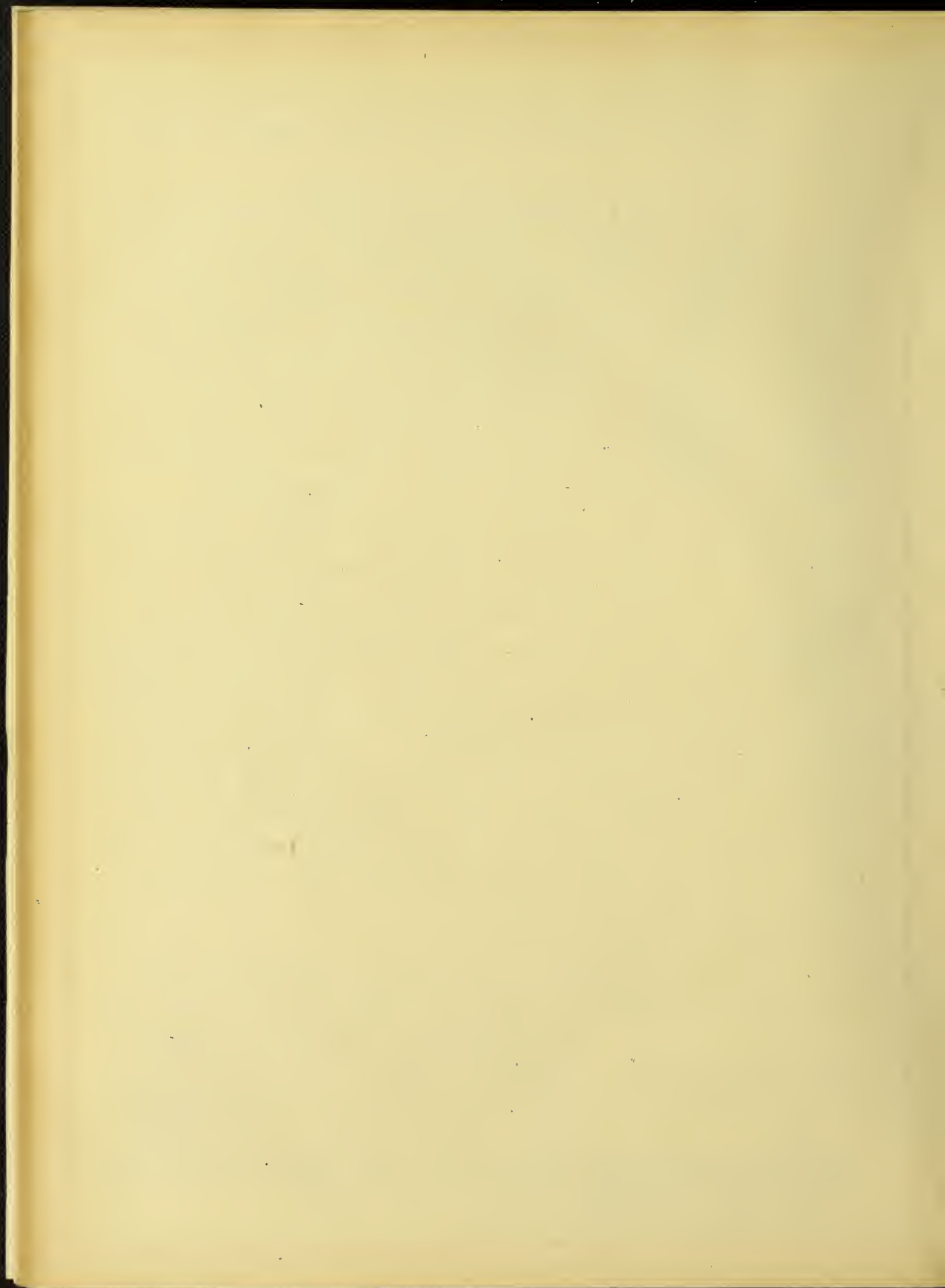
The great principle of primitive man was that he loved his friends and hated his enemies, e.g. - "Let those who speak evil of us perish. Let the enemy be clubbed, Primitive man loved his friends and hated his enemies. swept away, utterly destroyed, piled in heaps, let their teeth be broken, may

they fall headlong into a pit. Let us live and let our enemies

1. Lecky, Right and Wrong, 130.

2. Westermarck, Evolution of Moral Ideas. 1:169

3. Lecky, Right and Wrong, 128.



perish."¹ And even David, the man after God's own heart charged Solomon, to destroy his enemies.² Primitive man not only did not forgive his enemies, but he did not wish to, nor did he think better of a man for doing good to those that hated him."That man considered himself fortunate who on his death bed could say in reviewing his past life, that no one had done more good to his friends or more mischief to his enemies. This was the celebrated fealty of Sulla; this the crown of Xenophon's panegyric on Cyrus the Younger."³

Therefore "resentment at wrong, desire of retribution on the wrongdoer, are primordial principles as deeply implanted in our nature as piety or self-preservation, -implanted by the same Almighty Hand and as legitimate, nay necessary. They are organic

Retaliation is an organic principle of human nature but supplanted by passionless punishment of law.

instincts which we possess in common with the whole of creation, groaning and travailing in pain to-

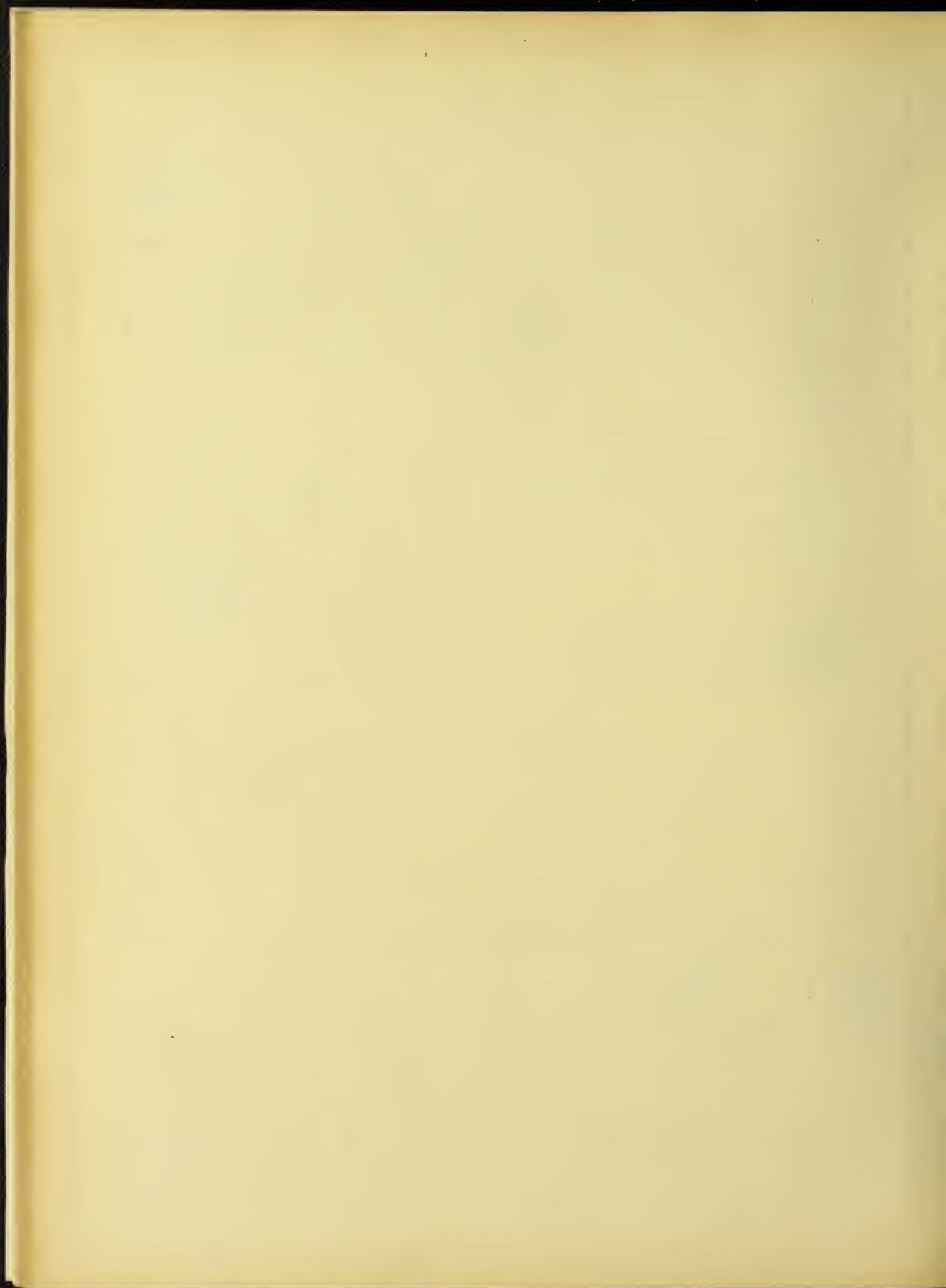
gether with us, in the struggle for existence, throughout nature's illimitable sphere of carnage and cruelty."⁴ Although our ancestors gave us such a heritage, and although the feeling of lex talionis arises in the most cultured of the twentieth century, nevertheless retaliation, certain to be cruel and excessive, has been superseded by the passionless "punishment of law" in the advance of civilization.

When justice is attained, the sins and crimes are visited on the individuals themselves. "All accusations are to fall on

Examples showing individual responsibility when justice is attained.

the doers of evil deeds. Let not father for son nor son for father, nor brother for brother, fear any

(For footnotes, see p 39.)



accusation, but he alone shall be indicted as culpable who shall have committed the fault."⁵ "In those days they shall say no more the fathers have eaten sour grapes and the childrens' teeth are set on edge. But every one shall die for his own iniquity."⁶ "The fathers shall not be put to death for the children, neither shall the children be put to death for the father; every man shall be put to death for his own sin."⁷ "The soul that sinneth it shall die. The son shall not bear the iniquity of the father, neither shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him."⁸

When the individual became responsible for his own acts, there was an authority which guaranteed that his rights were to be respected, and demanded that he must pay the penalty if he vio-

When revenge became rational and therefore moral justice arose from it.

lated those of society. Therefore the state originated codes of criminal law by which it took control of injuries and undertook to revenge them on behalf of the

victims, as well as the vindication of public authority and order; injuries became crimes and revenge became punishment. Criminal law and criminal administration were developed out of blood revenge when it was rendered rational, and its traditional and customary processes subjected to criticism. Hence private and public vengeance connected with moral responsibility formed the transitional basis out of which justice arose.

1. Fison, Milaneseans, 147-Quoted by westermarck, 2:173-4.

2. Second Kings, 2:8.

3. Fison, Milaneseans, Quoted by Westermarck, 2:173-4.

4. Lecky, Right and Wrong, 130.

5. Laws of Visigoths, Book 6, Law 8. Quoted by Sutherland, 2:168.

6. Jeremiah, 31:29, 30.

7. Deut. 24:16.

8. Ezekiel, 18:20.

In the transition several ideas can be noticed. (1) As long as the family or the tribe administered or had the right to administer the law of blood revenge, there was no guarantee that it would be done. (2) As long as retaliation was inflicted there was no guarantee that revenge would be sufficiently discriminating.

Reasons for transition.

The proportion between the retaliation and the offense was not just. The retaliation increased with the pain inflicted; consequently the more powerful party demanded and exacted a head for a tooth. Thereby whole tribes were, generation after generation, sworn enemies whose born duty it was to see how quickly they could put the other out of the way.

But with the growth of public justice the court system is changed. The courts have no longer to watch over the hostile

Substitution of justice for revenge.

tribes but to keep peace in the society of which they are an expression, investigate and punish the breaking of laws and protect

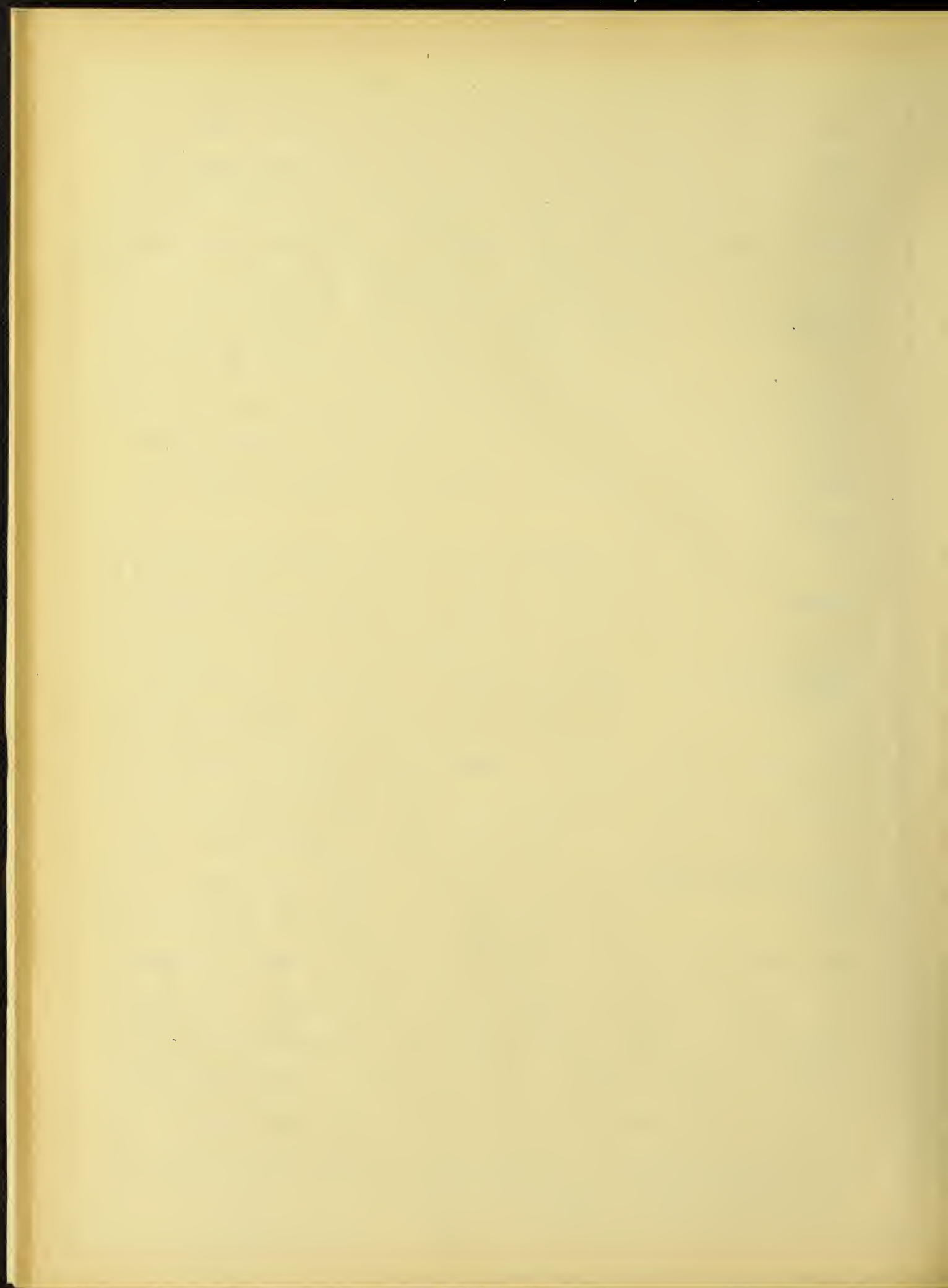
the rights of the innocent. Several great changes necessarily follow as a result. In the first place, the obtaining of re-

(a) By making offender responsible to court.

dress by might is unnecessary. The injured party can take the matter to court, but he is not allowed the law of revenge.

When the process of justice in court action is weak, a compromise between the old and the new often takes place. The court itself may allow the law of revenge to be operative, as a concession to human weakness. Especially where strong passions are involved, even to-day the court allows revenge on a man for disturbing the sanctity of the marriage relation. The transition

1. Hobhouse, *Morals in Evolution*, 1:106.



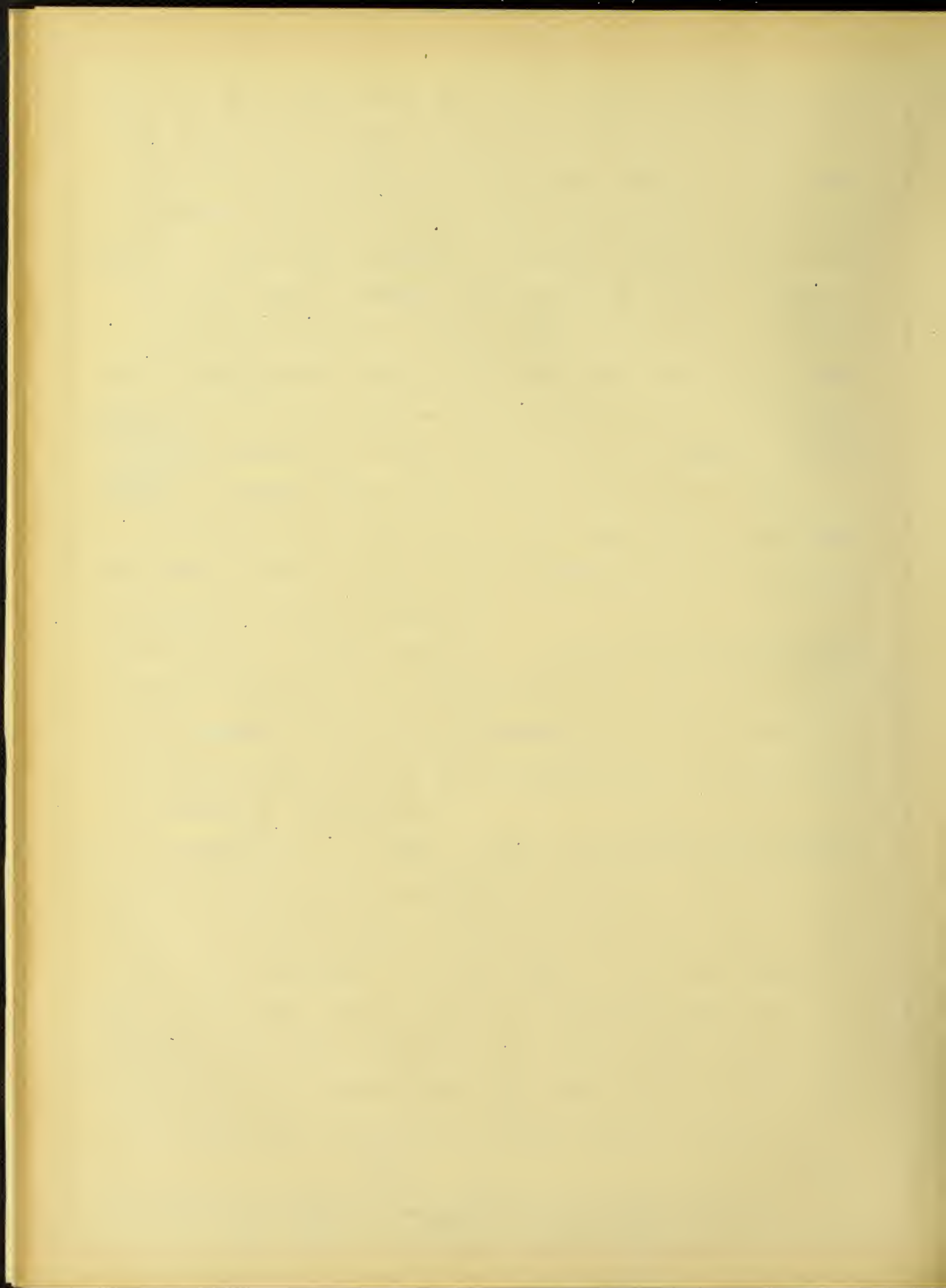
from this state of affairs to the condition under which the court took charge of all civil and criminal cases was slow for ethical change must be brought about. From the earliest time the social order itself rested on the very fact of all the kin standing by any of their members in quarrels. Therefore the duty of avenging a kinsman's death, and "loving ones neighbor in this sense and hating ones enemy was the most sacred of primitive principles, bound up with everything that made a common life possible."¹ The attainment of justice demanded that society forego this principle, and that triumph is one of society's greatest achievements.

But if the kindred tribes are no longer allowed to avenge themselves, in the same manner the offender is not allowed to make peace with the offended.² Crime becomes a public affair,"and

(b)By making injured in varying degrees according to depend on court for redress. time and country, the public authority takes upon itself the function of maintaining order and of discovering as well as punishing offenders."¹ Though the injured person set the machinery of investigation and prosecution

(c)Therefore by both, in progress, the result depends to a large extent on the criminal and civil justice arose. injury received. Justice established will not calculate the degree of magnitude of the injury but it will calculate the degree of culpability of the one who caused it. Vengeance, the object of the old court procedure, if we may call the blood feud a court process, took, when justice was established, the form of punishment inflicted by the judge upon the criminal and of restitution to the injured. Criminal and civil justice was therefore the result.

In a brief review of the main points in the evolution of
L.Hobhouse, Mor. in Ev. 1:106ff. 2.P.&M. His. Eng. law. 2:485.



justice, we find that the community in the beginning interfered principally on religious or supernatural grounds only with those actions which were believed would affect its existence. "Otherwise justice, as we know it, in the sense of an impartial upholding of the rights and an impartial punishment of wrongdoing," was unknown. Rather than justice a purely private and personal retaliation was recognized. Blood feud and the law of revenge was the logical development of personal and individual retaliation.

Summary. Responsibility of member for member and of tribe for

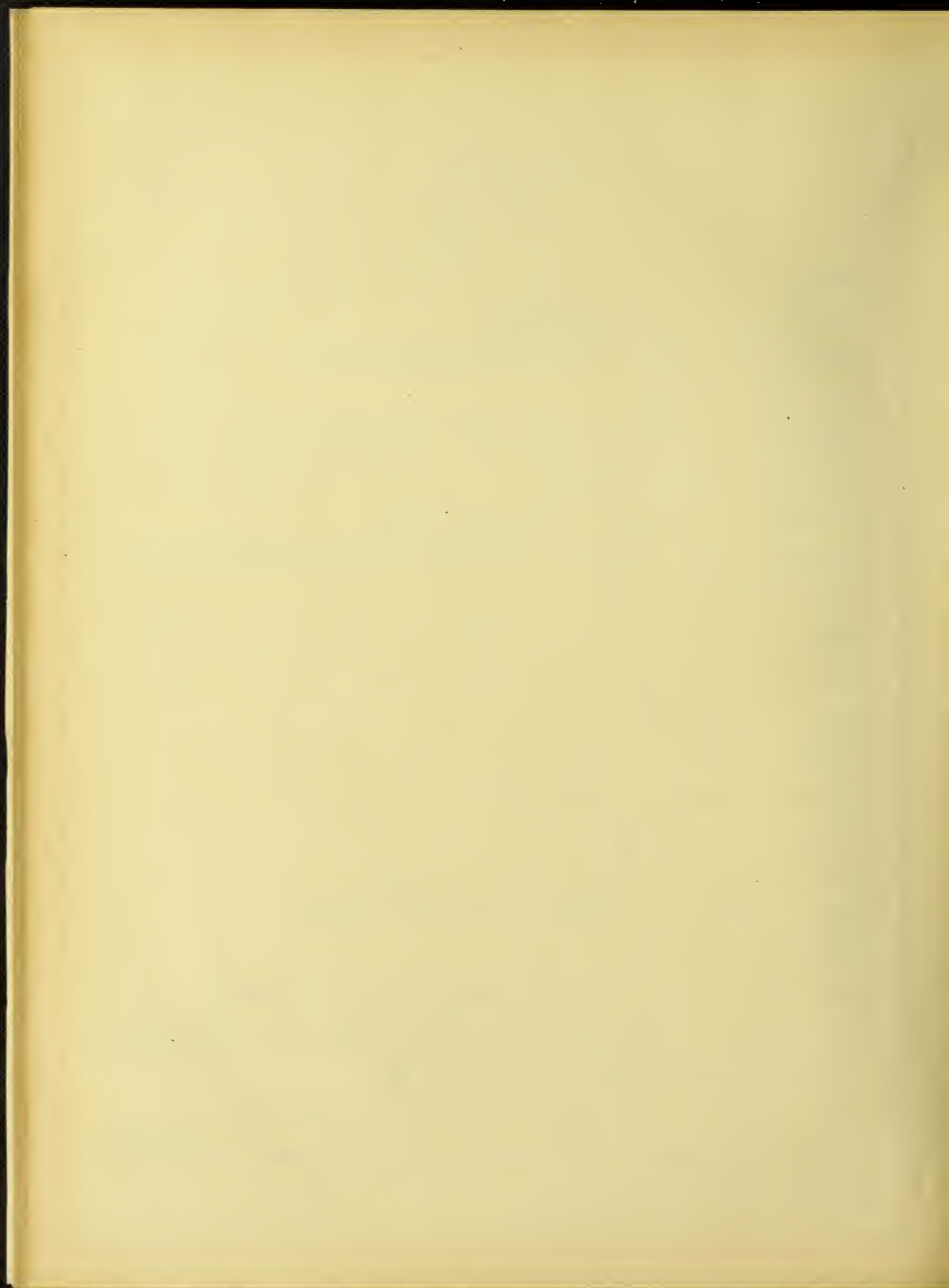
tribe, was collective, redress was collective and concerted. All questions of accident and of intention were lumped together, and there was no system by which punishment was dealt to individuals for their own crimes. When the principle of mitigation and substitution was developed (money payments) the vitality of the race and the country was conserved, but no direct ethical change occurred. "It is only as social order evolved an independent organ for the adjustment of disputes and the prevention of crime, that the ethical idea becomes separated out from conflicting passions which are its earlier husk, and step by step the individual is separated from his family, his intentions are taken into account, his formal rectitude or want of rectitude is thrown into the background by the essential justice of the case, appeals to magical processes are abandoned, and the law sets before itself the aim of discovering the facts, and maintaining right or punishing wrong accordingly."²

1. Hobhouse, *Morals in Evolution*. 1:119.
2. Hobhouse, *Morals in Evolution*. 1:120.



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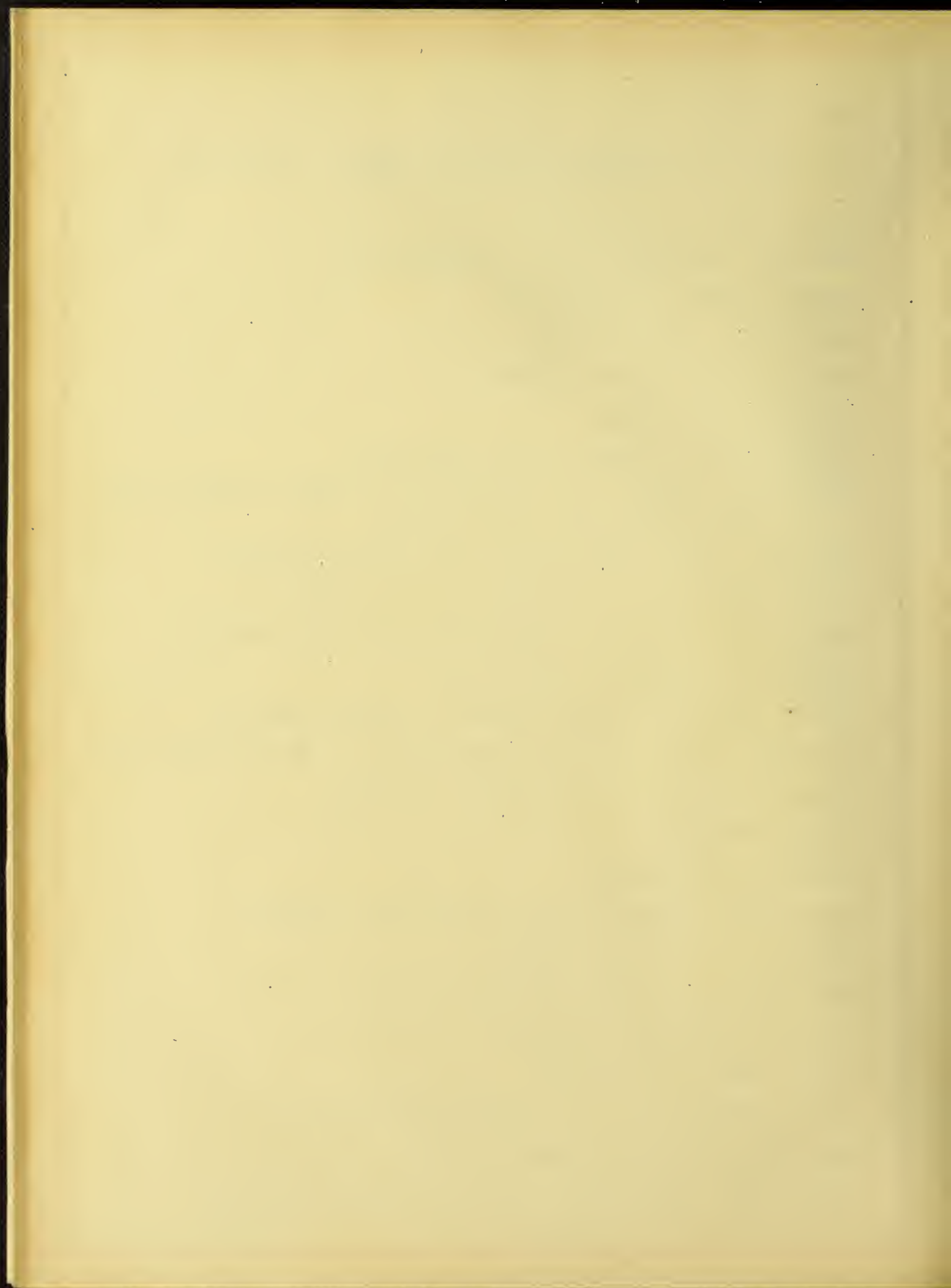
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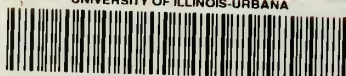
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